No. 95-596

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEP GROUP PLC, WILLIAM R. BERKLEY, JOHN L. READ, PETER J. GRANT, JOHN R. EAST,

Petitioners,

VS.

ITOBA LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
By: WILLIAM G. MCGUINNESS
Attorneys for Petitioners William R. Berkley and Peter J. Grant
One New York Plaza
New York, New York 10004
(212) 859-8000

74 pp

QUESTIONS PRESENTED

(i) Should the "precious resources" of the United States courts be devoted to regulating securities transactions, between foreigners, effected over foreign stock exchanges that involve securities that do not trade in the United States?

(ii) Should these "precious resources" be expended when no fraudulent conduct has occurred in the United States, United States markets and shareholders are not affected and no substantial United States interest is implicated?

(iii) What test should be applied by the Circuits, which are split, to offer predictability and certainty in determining the extraterritorial reach of the United States securities laws?

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OPINIONS BELOW

The decision of the United States District Court for the District of Connecticut dismissing plaintiff Itoba Ltd.'s federal securities law action for lack of subject-matter jurisdiction was rendered in an unreported decision dated March 14, 1994. A20-21.[1] The decision of the Court of Appeals for the Second Circuit reversing the district court's decision regarding the jurisdictional reach of United States securities laws was issued on May 15, 1995, and is reported at 54 F.3d 118, *reh'g denied*, __F.3d ___ (1995).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on May 15, 1995. A4. Petitioners timely filed a petition for rehearing with a suggestion for rehearing *en banc* pursuant to Rules 40 and 41 of the Federal Rules of Appellate Procedure. The Second Circuit denied the petition on July 14, 1995. A1-2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. The jurisdiction of the district court was invoked under 15 U.S.C. § 78c(17).

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1 References to "A _" are to the Appendix annexed to this petition.

STATUTORY PROVISIONS INVOLVED

This case involves the Securities Exchange Act of 1934, as amended, Sections 27 (15 U.S.C. § 78aa), 10(b) (15 U.S.C. § 78j(b)), Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5)) and Section 3(a)(17) (15 U.S.C. § 78c(17)), which are quoted verbatim in the Appendix. A36-38.

STATEMENT OF THE CASE

This case presents an opportunity for this Court to establish certainty in an area of the law in which predictability is essential -- the extraterritorial reach of the United States securities laws. Settling the circuit split over this issue is essential, given the increasing globalization of the world securities markets resulting from, among other things,[2] the development of American Depositary Receipt ("ADR") programs.[3]

Transactions involving ADRs effected in the United States markets have long been subjected to the application of the United States securities laws. *See, e.g., IIT v. Cornfeld*,

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2 The ramifications of the decision below are not limited to companies with ADR programs. Under the Second Circuit's reasoning, any corporation, anywhere in the world, is potentially subject to the United States securities laws if any of its affiliates have American shareholders, or if it purchases securities of any company that ever filed any documents with the Securities Exchange Commission ("SEC").

3 Foreign corporations initiate ADR programs by removing a small percentage of their stock from trading over foreign stock exchanges and depositing it with a United States bank which sponsors American Depositary Shares ("ADS") that trade over United States stock exchanges. Today, there are almost 1,000 foreign corporate sponsors of ADR programs. *See* Joseph Valli, *American Depositary Receipts: An Overview*, 17 Fordham Int'l L.J. 538 (1994).

619 F.2d 909, 918 (2d Cir. 1980); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1044 (2d Cir. 1983); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968), *(en banc)*, *cert denied*, 395 U.S. 906 (1969). However, until the Second Circuit's decision in *Itoba Ltd. v. LEP Group plc.*, 54 F.3d 118 (2d Cir.), *reh'g denied*, __ F.3d__(1995), no court ever provided a United States forum for a foreign purchaser, who purchased over a foreign exchange the securities (not the ADRs) of a foreign issuer -- simply because the foreign issuer had a small ADR program.[4]

The impact of the Second Circuit's decision in *Itoba* is broad and far ranging, not only to the growth and development of the United States and international securities markets, but also to the United States court system. The Second Circuit decision threatens to open the doors of the United States courts to foreign purchasers of foreign securities on foreign exchanges that the United States has little interest in regulating.

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[4] The number of companies this case affects is large and increasing rapidly. During the past four years, the number of foreign companies listed on the New York Stock Exchange ("NYSE") has doubled, and the NYSE's current president, Richard Gasso, is actively seeking to double foreign listings again. L. Malkin, "NYSE Is Going More Global," *Int'l Herald Tribune* (Aug. 8, 1995) (hereinafter "Malkin"). This goal will be seriously thwarted if the United States imposes its securities laws on these foreign corporations, not only for transactions on United States exchanges, but for all such foreign corporations' securities transactions anywhere in the world.

This case presents a perfect opportunity for this Court to set the metes and bounds of the United States securities laws.[5] Before this Court is a foreign issuer, LEP Group plc ("LEP"), with a small ADR program (involving less than 10% of LEP's shares), and a foreign purchaser who purchased ordinary shares (not ADRs) over the London Stock Exchange -- LEP's primary trading market. All conduct relating to these foreign securities transactions -- including the preparation of the allegedly fraudulent disclosure statements -- involved foreign corporations, acting abroad. The securities plaintiff purchased do not even trade in the United States. Indeed, the only American connection to this case is the happenstance of LEP's ADR program and the fact that plaintiff's parent corporation, a non-party to this action, has some American shareholders.

To sustain jurisdiction over these entirely foreign transactions, the Second Circuit overruled twenty years of Second Circuit precedents -- abandoning judicial analyses that were designed to create predictability in jurisdictional jurisprudence and limit the transactions litigated in the American courts to cases that implicated American interests. The Second Circuit based its finding of jurisdiction on plaintiff's claim that it derivatively relied on SEC filings made in connection with securities plaintiff did not purchase that were never intended to be and were not actually received or read by plaintiff. Premising jurisdiction on the integration of

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5 For a complete recitation of the facts of this case, defendants Berkley and Grant respectfully refer the Court to the petition for certiorari submitted by co-defendants LEP Group plc and John East.

derivative reliance principles into the jurisdictional analysis eliminates any predictability from the jurisdictional inquiry -- any foreigner who can point to an alleged American act, fraudulent or not, that potentially could affect a foreign securities market can now bring an action in a United States court by pleading derivative reliance on American activities.

The question squarely presented is whether the United States must provide a forum for investors anywhere in the world when their investment involves a company that happens to sponsor an ADR program. By resolving this question, this Court will determine (i) the appropriate level of the burden that United States courts should bear hearing lawsuits involving no American parties or American interests; and (ii) the propriety of imposing United States law on transactions over numerous foreign stock exchanges that are already regulated by foreign securities laws.

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUITS ARE APPLYING CONFLICTING STANDARDS TO DETERMINE THE JURISDICTIONAL LIMITS OF UNITED STATES SECURITIES LAWS

Predictability is a predominant concern in jurisdictional analysis. As this Court has explained, a prerequisite to the exercise of jurisdiction over a defendant is that

> the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there. . . . The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (citations omitted).[6] Extraterritorial application of

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6 *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*, __ U.S. __, 115 S. Ct. 1043, 1046 (1995) (Thomas, J., concurring in the judgment) ("This Court pursues clarity and efficiency in . . . federal subject-matter jurisdiction."); *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 1034 (1985) (Blackmun, J.).

the securities laws likewise implicates these concerns.[7] In this area in which certainty is imperative, this Court should grant this Petition for Certiorari to resolve a circuit split and allow foreign corporations and individuals who trade over foreign exchanges to structure their business affairs with minimal assurance that their conduct will or will not subject them to being haled before United States courts.

1. The Original Second Circuit Analysis, Which Was Followed By The Fifth, Seventh And D.C. Circuits

Before its decision in this case, the Second Circuit, as the pioneer court in the securities area, initially set forth the "conduct" and "effects" tests to determine when United States interests were sufficiently at stake such that extraterritorial jurisdiction was proper. After the Second Circuit set forth these standards, the Fifth, Seventh and District of Columbia Circuits adopted the test set forth by Judge Friendly. *See, e.g.*,

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[7] *See, e.g.*, Gregory K. Matson, Note, *Restricting Jurisdiction of American Courts over Transnational Securities Fraud*, 79 Geo. L.J. 141, 168 (1990) ("the courts must shape the extraterritorial application of the antifraud provisions so that decisions are consistent and principled in order to place foreign individuals on notice as to when they face liability under United States law"); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985) ("courts should frame a general approach that will enable multinational and foreign entities to predict the jurisdictional consequences of various actions and thus to choose among them intelligently").

MCG, Inc. v. Great Western Energy Corp., 896 F.2d 170 (5th Cir. 1990); *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27 (D.C. Cir. 1987); *Tamari v. Bache & Co (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984).

As the Second Circuit recognized, "the Securities Act of 1933 and the Securities Exchange Act of 1934 are silent as to their extraterritorial application, so that the federal courts have had to determine 'whether Congress would have wished the precious resources of the United States courts' to be used in resolving disputes between foreign entities in the area of securities fraud." A10 (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.) *cert. denied sub nom., Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975)). In analyzing the proper extraterritorial scope of the United States securities laws, the Second Circuit has stated:

> Congress intended the Exchange Act to have extraterritorial application in order to *protect domestic investors* who have purchased foreign securities on American exchanges and to *protect the domestic securities market* from the effects of improper foreign transactions in American securities.

Scheonbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969) (emphasis added).[8] This case

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[8] Federal courts "are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School District*, 475 U.S. 534, 540 (1986). Accordingly, this Court has repeatedly emphasized the importance of "proceed[ing] with caution in construing constitutional and statutory provisions

Footnote continued

involves neither "domestic investors" nor "domestic securities markets" and thus does not involve the principle interests the Exchange Act was intended to protect.

The Second Circuit's original analysis closely confined subject matter jurisdiction under the federal securities laws in cases involving foreign parties and foreign securities transactions.[9] The Second Circuit has required foreign plaintiffs to demonstrate that the case involves significant American activities before burdening the United States courts

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Footnote continued from previous page

dealing with the jurisdiction of the federal courts, *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), lest the courts exercise "power the Congress has denied them." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 (1950). In the extraterritorial context, the Court presumes, absent evidence of a contrary intent, that congressional legislation is meant to apply only within the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

9 This Court recently reiterated the need for caution regarding judicial expansion of the federal securities laws when it declined to extend their reach to aiders and abettors of securities fraud, despite years of expansive decisions in the Courts of Appeals. *Central Bank, N.A. v. First Interstate Bank, N.A.* ___ U.S. ___, 114 S. Ct. 1439, 1448 (1994) ("The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.").

with its adjudication. This inquiry focuses on the interest of American citizens in the disposition of the action.

> When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.
>
> Using this approach, [the Second Circuit] held:
>
> [T]he anti-fraud provisions of the federal securities laws:
>
> > (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
> >
> > (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
> >
> > (3) *Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.*

Fidenas AG v. Campagnie Internationale, Etc., 606 F.2d 5, 9-10 (2d Cir. 1979) (quoting *Bersch*, 519 F.2d at 993) (emphasis added). Under this formulation, American courts can entertain a case brought by a foreigner and arising out of a foreign securities transaction only if substantial fraudulent "conduct" in the United States has been the direct cause of the loss, or if a foreign fraud has a substantial "effect" on United States citizens. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

Under the "conduct" test as originally formulated by the Second Circuit, the relevant conduct in the United States must consist of fraudulent acts (or culpable failures to act) which are sufficient to comprise an element of an action under section 10(b) and Rule 10b-5. *See, e.g., Alfadda*, 935 F.2d at 478 ("the court has . . . jurisdiction if the . . . particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad"); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *Bersch*, 519 F.2d at 974. The *Vencap* court identified the specific United States interest at stake, namely preventing the United States from becoming "a base for the exportation of fraud." *Vencap*, 519 F.2d at 1017. The Court thus specifically limited jurisdiction to cases involving fraudulent conduct within the United States conduct, holding that

> Our ruling on this basis of jurisdiction is limited to the *perpetration of fraudulent acts themselves* and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries.

Id. at 1018 (emphasis added).

2. Three Circuits Adopt Different Jurisdictional Analyses

Shortly after the Second Circuit decided *Bersch* and *Vencap*, the Third Circuit, in *Securities Exchange Comm'n v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied sub nom., Churchill Forest Indus., Ltd. v. Securities Exchange Comm'n*, 431 U.S. 938 (1977) adopted a different approach. The district court in *Kasser* applied the Second Circuit's test and found that the level of conduct in the United States was insufficient to support jurisdiction under Second Circuit precedent. *See Securities Exchange Comm'n v. Kasser*, 391 F. Supp. 1167, 1175-76 (D.N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir.), *cert. denied sub nom., Churchill Forest Indus., Ltd. v. Securities Exchange Comm'n*, 431 U.S. 938 (1977). The Third Circuit rejected the Second Circuit approach, holding that "[t]he federal securities laws, in our view, do grant jurisdiction in transnational securities cases where *at least some activity designed to further a fraudulent scheme* occurs in this country." *Kasser*, 548 F.2d at 114 (emphasis added). Thus, under the Third Circuit's formulation "fraudulent acts themselves" need not occur in the United States so long as "some activity" occurs here.

The Eighth Circuit noted the difference between the Second and Third Circuit approaches and decided to adopt its own approach. In *Continental Grain, Etc. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979), the Eighth Circuit analyzed the case law developed by the Second Circuit in *Schoenbaum*, 405 F.2d at 200, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), *Vencap* and *Bersch*, and contrasted it with the *Kasser* decision. That court concluded, "[w]e believe . . . that the Third Circuit in *SEC v. Kasser* extended the boundaries of the necessary domestic conduct required to find subject matter jurisdiction as defined in *Bersch-IIT*." *Id.* at 418. The Eighth Circuit then set forth

its own test with respect to the level of fraudulent conduct in the United States that supports jurisdiction. *Continental Grain* held that "where defendants' conduct in the United States was *in furtherance of a fraudulent scheme and was significant with respect to its accomplishment*, and moreover necessarily involved the use of the mails and other instrumentalities of interstate commerce, the district court has subject matter jurisdiction." *Id.* at 421 (emphasis added). Thus, in the Eighth Circuit, conduct in the United States which is less than "fraudulent acts themselves" (as in the Second Circuit) but more than "some activity" (as in the Third Circuit) is necessary to support subject matter jurisdiction under *Continental Grain*.

The Ninth Circuit also noted the schism in the Circuits, and has opted for the Eighth Circuit approach. In *Grunenthal GmbH v. Hotz*, 511 F. Supp. 582 (C.D. Cal. 1981), *rev'd*, 712 F.2d 421 (9th Cir. 1983), the district court concluded that, in the absence of controlling Ninth Circuit precedent, it would rely upon the conduct test as formulated by the Second Circuit to analyze the subject matter jurisdiction question. Under that approach the district court ultimately found that jurisdiction was lacking. *Id.* at 587-88. That Court specifically noted that "in reaching this conclusion, we recognize that the Eighth Circuit has adopted a more liberal approach to the assertion of jurisdiction in transnational securities fraud cases . . . we believe, however, that the line of cases from the Second Circuit is more in keeping with the expressions of the Ninth Circuit." *Id.* at 588.

The Ninth Circuit reversed, choosing instead to adopt the *Continental Grain* test. *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983). Noting that, "consistent with the established objectives of the federal securities laws, we have recognized that 'the jurisdictional hook need not be large to fish for securities laws violations,'" the court held that "the test for subject matter jurisdiction formulated by the Eighth Circuit . . . best satisfies those objectives." *Id.* at 424. By adopting the broader version of the conduct test, the Ninth Circuit (like the

Eighth and the Third) was able to assert jurisdiction although the *Grunenthal* facts did not give rise to jurisdiction under the Second Circuit standard.

3. The D.C. Circuit Analysis

In the wake of the line of cases employing different standards of extraterritorial jurisdiction, the District of Columbia Circuit was confronted with the issue in *Zoelsch*, 824 F.2d at 27. Judge Robert Bork analyzed in depth the development of the two jurisdictional standards that following the Second Circuit's decisions in *Bersch* and *Vencap*. The *Zoelsch* court noted that the difference between that test and the one developed in the *Kasser* line of cases is that "*Continental Grain* explicitly repudiated the Second Circuit's requirement that 'domestic conduct constitute the elements of a rule 10b-5 violation' in favor of a test that would find jurisdiction whenever the domestic conduct 'was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment." *Zoelsch*, 824 F.2d at 31. The *Zoelsch* court then observed that

> [t]he consequence of these approaches has been a loosening of the jurisdictional requirements: any significant activity undertaken in this country -- or perhaps any activity at all -- that furthers a fraudulent scheme can provide the basis of American jurisdiction over the domestic actor.

Id. Judge Bork thought that the restrictive test advocated, prior to *Itoba*, by the Second Circuit represented the better view when considering judicial restraint, the plain language of the relevant statutory provisions, legislative history and public policy issues. Concluding that the *Kasser* test constituted impermissible judicial activism, and did not necessarily reflect

the will of Congress, the D.C. Circuit decided instead to adopt the recently repudiated Second Circuit's view.

4. The Second Circuit's Abandonment Of Its Own Precedents And Creation Of The Hybrid "Admixture" Test

The D.C. Circuit's adoption of the Second Circuit view created a majority of circuits in favor of a jurisdictional analysis more closely allied to the identification of United States interests. However, the Second Circuit has now undermined the well-established jurisprudence by repudiating the tests it promulgated. The Second Circuit referred to its own prior precedents (now followed in the D.C., Seventh and Fifth circuits) as "questionable law," directly overruling the jurisdictional reasoning articulated in *Bersch*, 519 F.2d at 974. A18. The *Itoba* decision, in the view of certain commentators "represents the Court's most expansive reading of the extraterritorial reach of the federal securities laws."[10]

Recognizing that neither the "conduct" nor the "effects" test was met in *Itoba*, the Second Circuit replaced those established tests with an "admixture" test that greatly expands the jurisdiction of the United States courts for foreign purchasers of foreign securities in unpredictable ways. A10. The Second Circuit's decision sets forth an amorphous new

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10 Flumenbaum & Karp, *Extraterritorial Application of Federal Securities Laws*, N.Y.L.J., May 23, 1995 at 3; *see also* Newman & Burrows, *Extraterritorial Securities Jurisdiction: The Right Ingredients*, N.Y.L.J., May 31, 1995 at 3 (*Itoba* "appears to have enlarged the class of cases to which the courts may apply the securities laws extraterritorially").

test, lacking any predictive criteria, characterized as an "admixture" containing "a sufficient combination of ingredients the conduct and effects test." A10, A16. Had it not abandoned its prior precedents, the Second Circuit could not have sustained jurisdiction. Because the circuits are irreconcilably split, and because the question of how broadly to apply the securities laws to foreign transactions constitutes an important federal question and involves issues of international comity and judicial restraint, this Court should grant certiorari to establish the parameters of the extraterritorial scope of the securities laws. By doing so, this Court can create certainty in an area in which predictability is essential.

II.

THIS COURT SHOULD ADOPT A JURISDICTIONAL ANALYSIS THAT PROTECTS AMERICAN INTERESTS AND DOES NOT UNDULY BURDEN FOREIGN INTERESTS

Not only does the *Itoba* decision expand jurisdiction and invite foreigners to bring strictly foreign disputes into United States courts, it also usurps the ability of foreign governments and exchanges to regulate securities transactions by and between their own citizens and members. It therefore offends traditional notions of comity.

This Court has recognized that comity is an important factor in extraterritoriality analysis. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("[w]e cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts") (quoting *The Bremen v. Zapata off-Shore Co.*, 407 U.S. 1 (1972)); *see also Consolidated Gold Fields plc v. Minorco*, 871 F.2d 252, 263 (2d Cir. 1989), *cert. dismissed*, 492 U. S. 939 (1990) ("It is a settled principle of international and domestic law that a Court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a

particular remedy is so disproportionate to harm within the United States as to offer principles of comity."); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 611 (9th Cir. 1976) ("The effects test by itself is incomplete because it fails to consider the other nation's interest. Nor does it expressly take into account the full nature of the relationship between the actors and the [United States]").[11] When the United States asserts jurisdiction over activities occurring within the territory of another sovereign, its action may well be perceived as intrusive and perhaps even unlawful. If comity among nations is to have any meaning, a doctrine of extraterritorially must err on the side of restraint. Note, 98 Harv. L. Rev. 1310 at 1322.

Britain, like the United States, has well developed securities markets and laws designed to regulate them, including antifraud provisions. *See* J. Ian Murray, *Globalization of Government Securities Market: The 'Big Bang' and the United Kingdom Domestic Market, the Financial Services Act, and the New Regime for U.S. Government Securities*, Practicing law Institute, PLI Order No. B4-6786

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11 *See also* 1986 ALI Restatement of Foreign Relations, providing that the exercise of jurisdiction must be reasonable. The reasonableness requirement provides that, even where the exercise of jurisdiction is otherwise permissible, the courts should decline to exercise jurisdiction or prescribe law with respect to a person or activity having connection with another state when the exercise of jurisdiction is unreasonable. Courts are instructed to (1) consider the various interests; (2) examine contacts and links; (3) give effect to justified expectations; and (4) search for the center of gravity of a given situation.

(March 20, 1987); Bernard S. Black and John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 Mich. L. Rev. 1997 (June 1994). England is capable of regulating, and entitled to regulate, its own markets and trades, like the ones at issue here, over its exchanges. Principles of comity direct that the United States attempt to respect British laws -- and Britain's ability to regulate its own citizens and markets -- rather than usurp them by exerting jurisdiction over a case that does not involve any American interests.[12]

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12 Defendants vigorously dispute the Second Circuit's characterization of the merits of this case, but respectfully submit that the merits of this action are not relevant to the jurisdictional inquiry currently before the Court. The Second Circuit has observed:

> Fraud there might have been, and plaintiffs may very well have been damaged by its perpetration. But the dispute here presented is rightfully resolved in the courts of another land.

Fidenas, 606 F.2d at 10. Furthermore, resolution of the central issue presented by this petition -- whether Itoba's purchases of LEP ordinary shares over the London Stock Exchange trigger subject matter jurisdiction under the United States securities laws -- does not depend on any activities of Mr. Berkley. Itoba did not engage in *any* transactions with Mr. Berkley and had no contact with Mr. Berkley in connection with any of its purchases. Mr. Berkley was an outside director of LEP who had no involvement whatsoever in the creating, drafting or dissemination of the disclosures Itoba now claims were fraudulent. Accordingly, it was proper for the district court to find no subject matter jurisdiction under the United States securities laws for claims asserted against Mr. Berkley.

III.

THIS COURT SHOULD ADDRESS THE BURDEN THE DECISION BELOW WILL CAUSE

Recent trends and developments in both Congress and in American culture indicate that there is a general perception that the United States federal court system is congested with a veritable explosion of litigation. In connection with various proposed reforms, members of Congress have recognized that the court system, particularly in connection with securities litigation, is needlessly overburdened with no commensurate benefit to American investors or markets. *See* Statement of Hon. Carlos J. Moorehead, 103-156 103rd Cong., 2d Sess. 1994 ("A dysfunctional securities litigation system will not promote efficient capital markets."). In addition, "fear of litigation [is] the number one problem in attracting foreign issuers into U.S. financial markets." Statement of Pete V. Domenici, 103-156, 103rd Cong., 2d Sess. at 23 (1994). Senator Domenici went on to observe that various regulatory bodies "believe the current system is interfering with the efficient operation of our capital markets." *Id.*

The strain on United States courts is readily apparent to the judiciary at large. In response to "mounting concern with the federal courts' congestion, delay, expense, and expansion" the Chief Justice of this Court conducted a fifteen month study of the problems of the federal courts. The findings were distressing: although "we may be approaching the limits of the natural growth of the federal courts. . . the surge in case filings at both the trial and especially the appellate level continues with no cessation in sight." Report of the Federal Court Study Committee (April 2, 1990) at 8. The study describes the strain on the federal system as a "crisis." *Id.* at 3. While the study did not specifically address the issue of extraterritorial jurisdiction, one of the Committee's recommendations was to reduce the federal caseload by either limiting federal diversity jurisdiction, or eliminating it altogether. *Id.* at 38-43.

In the face of overwhelming social, Congressional and judicial concern for limiting federal court jurisdiction and protecting American interests in the securities litigation area, the Second Circuit has exponentially expanded judicially that jurisdiction in *Itoba*. Indeed, the decision below effectively eviscerates previously established limits on the federal securities laws, opening up American courts to numerous actions between foreigners with no connection to the United States.[13]

Until now, the majority Circuit view was that a fraud practiced by foreigners on foreigners over a foreign exchange was only subject to jurisdiction in two circumstances: (a) if a

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13 The Second Circuit has vastly expanded the cases that can be litigated in the United States. At least 60 countries have active stock exchanges, and new stock exchanges are being established frequently. Lawrence J. De Maria, *International Report: Stock Exchanges Strong in Quarter*, N.Y. Times, Oct. 5, 1987, at D12; *Stock Exchange in Warsaw Seeks to Join Federation*, N.Y. Times, June 1, 1994, at A2; Cynthia Mitchell, *Stocking up: Soviet Georgian is in Atlanta to Learn the Securities Game*, Atl. Const., Oct. 18, 1991, at G1. This growth in the number of international stock exchanges, together with the Second Circuit's willingness to provide a United States forum for transactions on such exchanges, sets the United States courts up as the international arbiter of countless securities transactions executed between foreigners in foreign lands. But, as the Federal Court Study Committee has discovered, the federal dockets are simply too congested to undertake the role of the international securities police. In any event, there are international organizations that are assuming this role. *Global Regulation Plans Get Boost*, The Insurance Regulator, July 31, 1995, Vol. 5, No. 30 at 3.

defendant performed substantial United States activities that constituted fraud, or (b) if the defendant caused a foreseeable loss to Americans. *Consolidated Gold Fields*, 871 F.2d at 261-62. The "admixture" test adopted by the Second Circuit eliminates these objective criteria, and purports to replace them with a rationale by hindsight which provides no standards by which foreign issuers can gauge their activities. Any foreign corporation that ever filed any information with the SEC is now at risk of having to defend itself against a fraud claim under American law, even if it has no other dealings with any American citizen, corporation or government agency. The almost one thousand foreign corporate sponsors of ADR programs, with a total market capitalization in excess of one billion dollars, must now anticipate that any purchaser, anywhere in the world, who received any advice from anyone, American or not, which was derived in any manner and at any level of indirectness from information that appeared in an SEC filing, can sue in an American court. This radical expansion of jurisdiction under United States securities laws to all international activities of ADR sponsors not only contributes to an overburdened judicial system, but is directly contrary to what all evidence indicates is the will of Congress and the efforts of the NYSE to increase the number of foreign corporations who list on United States exchanges.[14]

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14 Both the NYSE and the SEC seek to increase the number of foreign corporations listing here -- the NYSE is attempting to expand its trading hours to accommodate foreign companies and has begun experimenting with trading of foreign ordinary shares in home currencies. Reuters, *NYSE to Experiment with Trading Foreign Ordinaries*, (Sept. 12, 1995). Furthermore, the SEC has loosened its accounting requirements to facilitate foreign companies listing on United States exchanges. Malkin, *supra* n.4 at 2. These efforts to encourage foreign corporations to list on United States exchanges will be seriously undermined by the Second

Footnote continued

Until now, the majority Circuit view was that a central component of the "effects" test required illegal activity abroad to cause a "substantial effect" within the United States. *Alfadda*, 935 F.2d at 478. The Second Circuit based its decision, at least in part, on its conclusion that the alleged nondisclosure had a "deleterious effect" on ADT's United States shareholders. A15. But neither ADT nor its American shareholders were purchasers of LEP stock, and they are not parties to this action. By disregarding the distinction between a corporation, its subsidiaries and their shareholders, and premising jurisdiction on the theory that ADT, Itoba, and ADT's shareholders are equivalents, the panel effectively expanded jurisdiction to any case involving a foreign purchaser that has an affiliate with American shareholders. Previously the effects test could not be satisfied "simply because in the long run there was an adverse effect on this country's economic interests or on American securities prices." *Bersch*, 519 F.2d at 989.[15]

Footnote continued from previous page

Circuit's expansion of the jurisdictional reach of the United States securities laws to trading of foreign stock over foreign exchanges because some of the foreign corporation's stock trades over United States exchanges.

15 By eradicating the corporate distinctions between ADT and Itoba, the panel also disregarded the real party in interest rule and the doctrine of *Blue Chip Stamps* -- rules that previously required that the plaintiff suffer the injury alleged. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Rock Drilling Local Union No. 17 v. Mason & Hanger Co.*,

Footnote continued

Until now, a majority of Circuits would hold jurisdiction under the federal securities laws was limited to cases in which plaintiffs could show that United States conduct was the "direct cause" of foreign plaintiff's loss. *See, e.g., Bersch*, 519 F.2d at 993; *Alfadda*, 935 F.2d at 475. The Itoba decision eliminated this jurisdictional requirement by borrowing concepts of derivative reliance from substantive to 10b-5 law. A11-12. But then concepts of derivative reliance have no place in jurisdictional analysis, when it is the actual conduct of the defendant that gives rise to jurisdiction. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 286. By substituting substantive derivative reliance principles for the direct causation requirement, the *Itoba* decision opens the United States courts to any foreigner who can claim to have access to information from an SEC filing, no matter how remote.

Until now, no court has held that international securities exchanges actually constitute a single global market. The Second Circuit held that there was no distinction between LEP ADRs that traded on United States exchanges and LEP ordinary shares that traded on the London Stock Exchange because there was an alleged correlation between the trading price of these securities. A12. By equating securities that trade on domestic and international exchanges, and importing principles of derivative reliance -- principles that have expanded as a matter of substantive law to include the fraud on the market theory approved in *Basic, Inc. v. Levinson*, 485

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217 F.2d 687, 693 (2d Cir. 1954), *cert. denied*, 349 U.S. 915 (1955).

U.S. 224 (1988) -- the Second Circuit has effected a practically limitless expansion of the extraterritorial securities law jurisdiction. Any investor claiming that foreign market was somehow influenced by an ADR filing would now be entitled to a United States forum.

Plainly, the *Itoba* decision opens the doors of the United States courts wide to any plaintiff who cares to bring a securities fraud claim in connection with *any* transaction -- no matter how foreign or how tangential the American interests involved. This Court should grant certiorari, resolve the conflict in the circuits, and establish the boundaries of jurisdiction of the United States securities laws to cases

involving American interests.

IV.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Court issue a writ of certiorari.

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
Attorneys for Petitioners
William R. Berkley and
Peter J. Grant
One New York Plaza
New York, New York 10004
(212) 859-8000

By: William G. McGuinness
William G. McGuinness
(Attorney of Record)

Of Counsel:

Cassandra F. Lentchner
Jennifer L. Colyer

UNITED STATES COURT OF APPEALS
For the Second Circuit
United States Court House
40 Foley Square
New York 10007

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of July one thousand nine hundred and ninety-five.

Itoba Limited

Plaintiff-Appellant,

v. Dkt No: 94-7562

LEP Group PLC

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellees, LEP GROUP PLC, WILLIAM R. BERKLEY, PETER R. GRANT and JOHN R. EAST.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, CLERK
By: /s/

Beth J. Meador Date
Administrative Attorney

[Order entered on July 14, 1995.]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of May, one thousand nine hundred and ninety-five.

PRESENT: HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. ROGER J. MINER,
Circuit Judges.

Docket # 94-7562

ITOBA LIMITED,

Plaintiff-Appellant,

- v -

LEP GROUP PLC., WILLIAM R. BERKLEY, JOHN L. READ, PETER J. GRANT & JOHN R. EAST,

Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is reversed and the matter

remanded to the said district court for further proceedings consistent with the opinion of this Court.

GEORGE LANGE III, Clerk

By: /s/
Arthur M. Heller
Administrative Attorney

[Judgment entered on May 15, 1995]

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 582 - August Term 1994

(Argued December 1, 1994 Decided May 15, 1995)

Docket No. 94-7562

ITOBA LIMITED,

Plaintiff-Appellant,

v.

LEP GROUP PLC, WILLIAM R. BERKLEY, JOHN L. READ, PETER J. GRANT, JOHN R. EAST,

Defendants-Appellees.

Before: FEINBERG, VAN GRAAFEILAND and MINER, Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut (Eginton, J.) dismissing appellant's securities fraud action for lack of subject matter jurisdiction.

Reversed and remanded.

MARK C. ZAUDERER, New York, NY (James Robert Pigott, Jr., Stein, Zauderer, Ellenhorn, Frischer & Sharp, New York, NY, Richard F. Lawler, James C. Riley, Whitman Breed Abbott & Morgan,

Greenwich, CT, of counsel), for Plaintiff-Appellant.

JEFFREY E. GLEN, New York, NY (Berwin Leighton, New York, NY, Mark B. Seiger, Halloran & Sage, Hartford, CT, of counsel), for Defendant-Appellee LEP Group Plc.

WILLIAM MCGUINNESS, New York, NY (Fried, Frank, Harris, Shriver & Jacobson, New York, NY, of counsel), for Defendants-Appellees William R. Berkley and Peter J. Grant.

Alan H. McLean, Stamford, CT (Neville, Shaver, Kelly & McLean, Stamford, CT, of counsel), for Defendant-Appellee John R. East.

John L. Read, pro se.

VAN GRAAFEILAND, Circuit Judge:

Itoba Limited appeals from a judgment of the United States District Court for the District of Connecticut (Eginton, J.) dismissing its securities fraud action against Lep Group PLC, William Berkley, John Read, Peter Grant and John East for lack of subject matter jurisdiction. For the reasons stated below, we reverse and remand for further proceedings.

The corporate defendant in this case, Lep Group PLC, is a London-based holding company with some fifty subsidiaries operating in thirty countries. It is a true conglomerate, owning businesses in freight forwarding, home

security systems, biotechnology, travel services, and real estate speculation. Lep's "ordinary shares", the British equivalent of common stock, are registered in the United Kingdom, obligating the company to comply with United Kingdom securities laws. The primary trading market for Lep's ordinary shares is the International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd. (the "London Exchange").

To create a United States market for its ordinary shares, Lep deposited 12,842,850 of its approximately 136 million shares in an American depository in 1988. The depository in turn issued an American Depository Receipt (ADR) for each five ordinary shares of Lep on deposit. Because these ADRs trade in the form of American Depository Shares (ADSs) on the National Association of Securities Dealers Automated Quotation System ("NASDAQ"), Lep is subject to the reporting and disclosure requirements of United States securities law.

A.D.T. Limited ("ADT") is a transnational holding company based in Bermuda. Its shares are listed on the New York Stock Exchange and approximately fifty percent of its shareholders of record reside in the United States. Itoba, a Channel Islands company, is a wholly-owned subsidiary of ADT. ADT also is the corporate parent of A.D.T. Securities Systems, Inc., a Delaware based firm and one of America's largest suppliers of security and protection services.

In mulling over expansion plans for A.D.T. Securities Systems, ADT considered the possible acquisition of one of A.D.T. Securities Systems' largest competitors in the American security market, National Guardian. ADT already owned a small interest in that corporation through shares it held of Lep, the parent company of National Guardian. Because ownership of Lep would lead to control of National Guardian, ADT considered increasing its Lep holdings.

At the same time, Canadian Pacific was interested in expanding into the freight forwarding business and also was pondering a sizable investment in Lep. Learning of their mutual interest, the companies agreed to explore a joint purchase of Lep. Canadian Pacific hired S.G. Warburg, a London investment bank, to evaluate Lep's business operations. Nicholas Wells, ADT's in-house financial analyst, was directed by Michael Ashcroft, ADT's chairman, to perform a valuation of Lep.

In December 1989, S.G. Warburg issued an extensive report assessing Lep's prospects. The analysis in this report was based on Lep's U.K. annual reports, the Form 20-F that Lep filed with the United States Securities and Exchange Commission for the year ended December 31, 1988, Lep's shareholder register, and broker reports. Shortly after the Warburg report was issued, Canadian Pacific abandoned the proposed joint venture.

ADT's interest, on the other hand, did not diminish. Wells continued his examination of Lep, relying heavily on the Warburg report. To supplement his research, he obtained from Canadian Pacific a copy of Lep's Form 20-F for 1988. Wells frequently discussed his analyses of these documents with David Hammond, ADT's vice chairman and the person in charge of acquisitions.

Based on Wells' analyses and their own review of the Warburg report, Hammond and Ashcroft decided to acquire Lep. Soon thereafter, Hammond formulated a plan to increase ADT's Lep holdings by making anonymous purchases on the market through one of ADT's off-shore companies, in this case Itoba. Hammond contacted the board members of Itoba and recommended that they approve his purchase plan.

As expected, Itoba's board approved the plan. Itoba's board then requested one of ADT's employees to commence share purchases in Itoba's name; these purchases were made according to Hammond's plan and paid for by ADT. During

the second half of 1990, Itoba executed a number of significant purchases on the London Exchange pursuant to the plan. By November 1990, Itoba had acquired over 37 million Lep ordinary shares for approximately $114 million.

Before ADT could complete its planned acquisition, however, Lep disclosed a series of business reversals that decimated its share value; Lep's stock price plummeted 97% and the value of Itoba's Lep holdings declined by nearly $111 million. Lep wrote off approximately $522 million from its books for the fiscal year ended December 31, 1991.

Itoba sued Lep and its officers in the District of Connecticut, asserting violations of sections 10(b) and 20 of the Securities Exchange Act of 1934 (the "Act") and of Rule 10b-5. According to Itoba, the defendants were subject to liability because they failed to disclose material matters in statements filed with the SEC. Specifically, Itoba alleged that Lep made high risk investments and engaged in speculative business ventures without informing the investing public. Itoba claimed that had these matters been properly disclosed, it would not have purchased Lep's stock at artificially inflated prices.

Itoba also asserted claims against Lep director William Berkley for alleged violations of sections 10(b) and 12(2) of the Act and of Rule 10b-5. Berkley, a United States citizen and a resident of Connecticut, had sold a large block of Lep ordinary shares in the United States on the same day that Itoba purchased a large block of shares in London. Itoba alleged that had Berkley properly complied with his duty to disclose material, nonpublic information before trading, it would not have made that purchase.

Defendants moved to dismiss Itoba's claims for lack of subject matter jurisdiction, and Magistrate Judge Jean Margolis, to whom the matter was referred for recommendation and report, issued a report that recommended dismissing Itoba's action on jurisdictional grounds. The district court adopted the magistrate judge's recommendations in toto.

It dismissed Itoba's action on Fed. R. Civ. P. 12(b)(1) grounds in a short-form order. This, we conclude, was error.

It is well recognized that the Securities Exchange Act is silent as to its extraterritorial application. See, e.g., Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir.) (citing 15 U.S.C. § 78aa), cert. denied, 501 U.S. 1005 (1991). However, in determining whether Congress intended that the "precious resources of United States courts" be devoted to a specific transnational securities fraud claim, we are not without guidance. Two jurisdictional tests have emerged under this Court's decisions: the "conduct test", as announced in Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336-37 (2d Cir. 1972), and the "effects test", as announced in Schoenbaum v. Firstbrook, 405 F.2d 200, 206-09 (2d Cir.), rev'd with respect to holding on merits, 405 F.2d 215 (2d Cir. 1968) (in banc), cert. denied sub nom. Manley v. Schoenbaum, 395 U.S. 906 (1969). There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court. It is in this manner that we address the issue of jurisdiction in the instant case. Because we believe that the allegations are sufficient to support jurisdiction, we reverse.

Under the conduct test, a federal court has subject matter jurisdiction if (1) the defendant's activities in the United States were more than "merely preparatory" to a securities fraud conducted elsewhere, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir.), cert. denied, 423 U.S. 1018 (1975), and (2) these activities or culpable failures to act within the United States "directly caused" the claimed losses, Alfadda, supra, 935 F.2d at 478. Inherent in the conduct test is the principle that Congress does not want "'the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."' Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir.

1983) (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975)).

The magistrate judge correctly stated the conduct test when she said that Itoba must prove that Lep's United States-based activities directly caused Itoba's financial losses. However, whether she correctly applied the test is an entirely different matter. The magistrate judge based her recommendation to deny jurisdiction on the following findings:

> First, Itoba and ADT did not read the SEC filing and rely on them; it was an investment bank hired by ADT which had reviewed the documents. And second, the SEC filings were filed in connection with LEP's ADS's and ADR's, not the ordinary shares purchased by Itoba, for which annual reports and press releases were generated from England.

The magistrate judge's first finding -- that ADT and Itoba did not read and rely on the SEC filing in making their purchase decision -- must be rejected in view of the clearly-established fact that the executives of Itoba and ADT based their investment decision on the Warburg report. The analyses and conclusions in this report were predicated on information found in the Form 20-F that Lep filed with the SEC. Nicholas Wells, the ADT executive responsible for assessing investment prospects, made the Warburg report the centerpiece of his Lep valuation. Moreover, he not only relied on the discussion of the SEC filing as contained in the Warburg report, he also used his own copy of the 1988 Form 20-F to formulate his purchase recommendations. According to the affidavit of ADT's vice chairman, the decision to acquire Lep was based upon these recommendations.

The fact that Itoba's board members did not read the SEC filing is not of controlling significance. A party need not personally have read a misleading financial report to establish reliance; derivative reliance is a well-established basis for

liability in a Rule 10b-5 action. See, e.g., Austin v. Loftsgaarden, 675 F.2d 168, 177-78 & n.19 (8th Cir. 1982), appeal after remand, 768 F.2d 949 (8th Cir. 1985), rev'd on other grounds sub nom. Randall v. Loftsgaarden, 478 U.S. 647 (1986); Garfinkel v. Memory Metals, Inc., 695 F. Supp. 1397, 1404 (D. Conn. 1988); Kronfeld v. Trans World Airlines, Inc., 104 F.R.D. 50, 53-54 (S.D.N.Y. 1984); Walsh v. Butcher & Sherrerd, 452 F. Supp. 80, 84 (E.D. Pa. 1978); In re Ramada Inns Sec. Litig., 550 F. Supp. 1127, 1131 (D. Del. 1982). The acquisition plan that Itoba's directors approved was formulated and funded by ADT, which in turn relied on its financial officer's analysis of the Warburg report and Lep's SEC filing. The contents of Lep's 1988 Form 20-F were thus a "substantial" and "significant contributing cause" to Itoba's purchase decision. There is no requirement, as suggested by the magistrate judge's decision, that Itoba read Lep's filing before it could rely on it.

The magistrate judge's second reason for denying the jurisdiction, i.e., that the SEC filings were made in connection with Lep's ADSs and ADRs, not its ordinary shares, is only fifty percent correct and therefore is one hundred percent wrong. The ADRs were simply a grouping into one security of five ordinary shares. Inevitably, there was a direct linkage between the prices of the ADRs representing five ordinary shares and the prices of the single ordinary shares themselves. If the ordinary share price fell on the London Exchange, the market price of an ADR would decrease in similar manner, and visa versa.

Finally, a Rule 10b-5 action is not barred because a false and misleading statement in an SEC filing pertains to a security that is not the security purchased. See In re Ames Dep't Stores Inc. Stock Litig., 991 F.2d 953, 961-62 (2d Cir. 1993). So long as the fraudulent device employed is of the type that would cause reasonable investors to rely thereon and, so relying, cause them to purchase or sell the corporation's securities, a Rule 10b-5 action may lie. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968) (in banc), cert.

denied, 394 U.S. 976 (1969). SEC filings generally are the type of "devices" that a reasonable investor would rely on in purchasing securities of the filing corporation. When these United States filings include substantial misrepresentations, they may be a predicate for subject matter jurisdiction. See Psimenos, supra, 722 F.2d at 1045 (citing Leasco, supra, 468 F.2d at 1337).

The fact that the Lep ordinary shares were issued and purchased in England does not change our conclusion. "The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out the alleged fraudulent scheme. . . ." Psimenos, supra, 722 F.2d at 1045; see Leasco, supra, 468 F.2d at 1337.

Moreover, the making of the allegedly false and misleading filings with the SEC was not "merely preparatory to the fraud." Although the magistrate judge refrained from forthrightly stating as much, she tiptoed around that statement as follows:

> It is beyond dispute that SEC filings and press releases are the type of information on which an investor relies in making his or her investment decisions. Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968), cert. denied sub nom. Coates v. Securities & Exchange Comm'n, 394 U.S. 976 (1969). Even beyond the issue of whether the SEC filings were "merely preparatory to the fraud," plaintiff cannot demonstrate that the alleged acts within the United States "directly caused [its] losses" for two reasons.

She then propounded the two reasons we have rejected in the preceding paragraphs and cited two cases whose application here is questionable at best, Koal Industries Corp. v. Asland,

S.A., 808 F. Supp. 1143, 1153-55 (S.D.N.Y. 1992) and Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 107-08 (S.D.N.Y. 1993). In Koal Industries, a Panamanian corporation acquired two Netherlands Antilles corporations which owned interests in an Arkansas mining company. The entire transaction took place in Switzerland and the financing was obtained from outside the United States. The only contact with the United States other than the location of the mine was a telephone call seeking additional funds for the acquisition. Northgate involved a motion for class certification. The defendant was a Canadian corporation which owned an interest in a gold mine located in northern Canada, concerning which the defendant filed allegedly false SEC statements. The proposed class was to consist of all persons who purchased Northgate stock on the Toronto, Montreal, London and New York Exchanges. The defendant requested that the class be limited to those who purchased on the New York Exchange, and the district court granted its request. In contrast to the discretionary nature of the district court's class certification ruling and the "fraud on the market" class issues of Northgate, the instant case involves a single plaintiff asserting direct individual fraud.

Appellees address the issue of "preparatory conduct" more directly. They assert that the mere filing of a document with the SEC should not trigger jurisdiction in United States courts. In support of this contention, they point out that Lep's financial statements were prepared in England and contend that the act of filing alone should not confer subject matter jurisdiction in the United States. They say further that the filing was "incidental or preparatory conduct" in whatever wrongdoing may have occurred. With respect to the first contention, we hold that the situs of preparations for SEC filings should not be determinative of jurisdictional questions. Otherwise, the protection afforded by the Securities Exchange Act could be circumvented simply by preparing SEC filings outside the United States. We find no support in the Act for such a result.

The second half of appellant's argument overlooks a basic purpose of the securities law, which is fair disclosure of material facts. A material fact that is undisclosed in an SEC filing remains undisclosed absent public enlightenment. This may bring into play a concomitant duty, i.e., the duty to correct. See 2 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 6.11, at 138.401-.509 (2d ed. 1994). Lep's uncorrected nondisclosure played as much a role in Itoba's purchases as the price listings on the London Exchange and NASDAQ. In view of the deleterious effect this continued nondisclosure had on the thousands of ADT shareholders in the United States, it cannot be described correctly as incidental or preparatory.

This argument, of course, combines pertinent principles of both the conduct and effects tests, the latter one being based on fraud which takes place abroad which impacts on "stock registered and listed on [an American] national securities exchange and [is] detrimental to the interests of American investors." Schoenbaum, supra, 405 F.2d at 208. Here, we have fraud occurring on an American exchange and persisting abroad that has impacted detrimentally upon thousands of United States shareholders in the defrauded company, i.e., over $100 million lost in the shareholders' corporate equity.

The magistrate judge held that "if ADT were the plaintiff, the 'effects test' would be met, in that ADT's stock is traded on the New York Stock Exchange and approximately fifty percent (50%) of its shares are held in this country." See generally Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262-63 (2d Cir.), amended on other grounds, 890 F.2d 569 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989); Matter of Marc Rich & Co. A.G., 707 F.2d 663, 666-67 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); Restatement (Second) of Law of Foreign Relations § 18(b), cmt. d. We believe this reasoning applies with equal effect where, although Itoba, ADT's wholly-owned subsidiary, was the nominal purchaser and owner of the Lep stock, it was ADT

which financed the deal and which, with its shareholders, ultimately must bear the loss. This is not a case in which Lep's acts "simply [had] an adverse affect [sic] on the American economy or American investors generally." See Bersch, supra, 519 F.2d at 989. In short, we hold that a sufficient combination of ingredients of the conduct and effects tests is present in the instant case to justify the exercise of jurisdiction by the district court. See generally Leasco, supra, 468 F.2d at 1338.

For some reason that is not clear to us, the magistrate judge did not consider it necessary to address specifically Itoba's causes of action against any of the individual defendants. She simply recommended a blanket dismissal of the complaint as to all defendants, which recommendation was adopted without discussion by the district court. We find this particularly troublesome with respect to the defendant Berkley.

On October 8, 1990, Berkley, a United States resident and a Lep director, sold 7,300,000 ordinary shares of Lep to his United States-based broker, New York & Foreign Securities Corporation, which in turn sold these shares for its own account on the London Exchange. Berkley received almost $24 million for his shares. That same day, Itoba purchased 7,500,000 shares on the London Exchange through its London-based broker. Whether the close temporal relationship of these two transactions is or is not coincidental presents an interesting question. After executing this purchase, Itoba and ADT executives learned that the shares they had acquired were owned previously by Berkley. When Itoba brought the instant action, it asserted a separate claim against Berkley based on this Court's "disclose or abstain" rule, which imposes on insiders a duty to disclose material information before trading in their company's securities. See SEC v. Texas Gulf Sulphur Co., supra, 401 F.2d at 848. In Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 237 (2d Cir. 1974), we held that an insider who fails to comply with his duty to disclose or abstain can be held liable "not only to the purchasers of the actual shares sold by [the insider,] but to all

persons who during the same period purchased [the corporation's] stock in the open market without knowledge of the material inside information which was in the possession of [the insider]."

Although we do not presently rule on the issue, it would seem that Berkley's failure to disclose material, nonpublic information prior to selling his Lep shares is the type of behavior that falls under this Rule 10b-5 rubric. Because antifraud provisions are designed to prevent corporate insiders from taking unfair advantage of uninformed outsiders, Shapiro v. Merrill Lynch, supra, 495 F.2d at 235 (citing Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 890 (2d Cir. 1972)), Berkley's alleged nondisclosure during a sales transaction executed by two parties within the United States -- Berkley and his broker -- is the type of conduct that should trigger jurisdiction. See Roth v. Fund of Funds, Ltd., 279 F. Supp. 935, 936-37 (S.D.N.Y.), aff'd, 405 F.2d 421 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969).

Moreover, it is not clear that Itoba is disabled from asserting its claim because it purchased its shares on a foreign market -- the London Exchange. In Shapiro v. Merrill Lynch, supra, we held that an inside trader is subject to liability to all purchasers of his corporation's stock on the "open market." 495 F.2d at 237. Whether the "open market" encompasses foreign exchanges is an issue we leave for remand.

We conclude that Itoba's claim against Berkley should not have been incorporated without discussion into Itoba's claim against the non-resident defendants and just as silently dismissed.

CONCLUSION

Unlike some securities actions brought to recover questionable damages on behalf of optimistically described classes, we are met here with a single plaintiff which suffered direct substantial losses. A plaintiff such as this should not be

deprived of its day in an American court by a Rule 12(b)(1) order based on erroneous facts and questionable law. We conclude that the issues now before us best can be resolved by a trial on the merits in which the facts relevant to jurisdiction may be more fully developed. See Bersch, supra, 519 F.2d 992-93 (quoting Leasco, supra, 468 F.2d at 1330). We reverse the judgment below and remand for such a trial.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ITOBA LIMITED

v.

LEP GROUP plc, et al

CIVIL NO. 5:92cv556 (WWE)

CORRECTED
JUDGMENT

This cause came on for consideration on plaintiff's motion for order pursuant to Rule 60(a) or, in the alternative pursuant to Rule 54(b) before the Honorable Warren W. Eginton, Senior United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith granted the motion and further ordered judgment to enter in favor of defendant John L. Read in addition to those defendants in whose favor judgment has already entered, Fed. R. Civ. P. 60(a),

It is therefore ORDERED and ADJUDGED that the judgment be and hereby is entered in favor of the defendants Lep Group, John East, Peter Grant, William Berkley, and John L. Read, in accordance with the court's order.

Dated at Bridgeport, Connecticut this 23rd day of May, 1994.

KEVIN F. ROWE, Clerk

By /s/
Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ITOBA LIMITED

v.

LEP GROUP plc, et al

CIVIL NO. 5:92cv556 (WWE)

JUDGMENT

This cause came on for consideration of the defendants' motions to dismiss before the Honorable Joan G. Margolis, United States Magistrate Judge, having granted the motions to dismiss, and

The Honorable Warren W. Eginton, Senior United States District Judge, after de novo review, and over objection, affirmed Magistrate Judge Margolis' ruling,

It is ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the defendants Lep Group, John East, Peter Grant, and William Berkley, in accordance with the Court's ruling.

Dated at Bridgeport, Connecticut this 16th day of March, 1994.

KEVIN F. ROWE, Clerk

By /s/
Carol E. Cannady
Deputy in Charge

[Memorandum Endorsement]

[Originally typed in margin of first page of U.S. Magistrate Judge Joan Glazer Margolis's Recommended Ruling on Motions to Dismiss]

3/14/94: After de novo review, and over objections, the ruling of the Magistrate Judge is hereby AFFIRMED.

/s/
Warren W. Eginton,
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

ITOBA LIMITED	:	5:92 CV 00556 (WWE)
V.	:	
LEP GROUP plc, ET AL.	:	DATE: FEBRUARY 4, 1994

RECOMMENDED RULING ON MOTIONS TO DISMISS

On September 22, 1992, plaintiff Itoba Limited ["Itoba"] commenced this securities action with respect to allegedly fraudulent non-disclosure of facts in press releases and filings with the Securities and Exchange Commission ["SEC"] made by the defendant LEP Group plc ["LEP"]. As set forth in its complaint, Itoba is a corporation organized under the laws of the States of Jersey, Channel Islands, with its principal place of business in St. Helier, Jersey, Channel Islands (¶8). Itoba is a wholly-owned subsidiary of ADT Limited ["ADT"], a corporation organized under the laws of Bermuda, with its principal place of business in Hamilton, Bermuda (id.). Defendant LEP is a corporation organized under the laws of England, with its registered office in Epsom, Surrey, England (id. ¶10). The four additional defendants are present or former directors of LEP -- William R. Berkley (who resides in Greenwich, Connecticut), John L. Read, Peter J. Grant and John R. East.[1]

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[1]The action has been stayed as against defendant Read, a citizen of England who filed an Individual Voluntary Arrangement under British law. See Ruling on Pending Discovery Motions, filed Apr. 5, 1993 (Dkt. #81), at 3-6.

After jurisdictional discovery was completed, on May 24, 1993, defendants LEP, Berkley, Grant and East filed motions to dismiss plaintiff's complaint on the grounds that this court lacks subject matter jurisdiction or, in the alternative, that the complaint should be dismissed under the doctrine of forum non conveniens (Dkt. ##83-88).[2] On June 28, 1993, plaintiff filed its brief in opposition and four affidavits (Dkt. ##90-94).[3]

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[2]Defendant Berkley also filed an affidavit from his counsel, William G. McGuiness (Dkt. #85), to which the following four exhibits were attached: excerpts from the deposition of defendant Berkley, taken on March 10, 1993 ["Berkley Dep. Tr."] (Exh. 1); excerpts from the deposition of David B. Hammond, taken in London on November 24-25, 1992 ["Hammond Dep. Tr."] (Exh. 2); excerpts from the deposition of David L. Crespel, taken on February 10, 1993 ["Crespel Dep.Tr."] (Exh. 3); and excerpts from the telephone deposition of Peter W.S. Percival, taken on April 23, 1993 ["Percival Dep. Tr."] (Exh. 4).

Attached to the motion of defendants LEP and East was an affidavit from their attorney, Jeffrey E. Glen (Dkt. #87), to which nine exhibits were attached: copy of LEP's Form 6-K, filed with the SEC on July 6, 1989 (Exh. 1); copy of LEP's Form 6-K, dated October 12, 1989 (Exh. 2); copy of LEP's Form 6-K, dated April 20, 1990 (Exh. 3); copy of LEP's Form 20-F, dated June 29, 1990 (Exh. 4); additional excerpts from the Hammond deposition (Exh. 5); additional excerpts from the Crespel deposition (Exh. 6); excerpts from the deposition of defendant East, taken on February 25, 1993 (Exh. 7); excerpts from the deposition of defendant Read, taken on April 8, 1993 in Naples, Florida (Exh. 8); and additional excerpts from the Percival deposition (Exh. 9).

[3]The first affidavit was prepared by Hammond ["Hammond Aff't"] (Dkt. #91), to which three exhibits were attached: copy of ADT's Form 20-F, filed with the SEC on May 21, 1992 (Exh. 1); copy of ADT's Form 10-K, dated March 31, 1993 (Exh. 2); and copy of LEP's Schedule 13D, filed with the SEC on October 18, 1990 (Exh. 3).

The second affidavit was prepared by Itoba's counsel, Mark C. Zauderer (Dkt. #92), to which the following twelve exhibits were

footnote continued on next page

On July 27, 1993, defendants LEP, East, Berkley and Grant filed a reply brief (Dkt. #97).[4] On August 10, 1993, plaintiff

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attached: copy of plaintiff's complaint (Exh. 1); additional excerpts from the Hammond deposition (Exh. 2); additional excerpts from the Crespel deposition (Exh. 3); additional excerpts from the East deposition (Exh. 4); additional excerpts from the Berkley deposition (Exh. 5); additional excerpts from the Read deposition (Exh. 6); additional excerpts from the Percival deposition (Exh. 7); copy of LEP's Annual Report for 1991 (Exh. 8); copy of "Text of Address" given by David N. James, LEP's Chairman, at the "Extraordinary General Meeting and Annual General Meeting" held on August 24, 1992 (Exh. 9); copy of an article appearing in the London Daily Telegraph on November 21, 1992 (Exh. 10); letter from plaintiff's counsel to defense counsel, dated December 29, 1992 (Exh. 11); and Statement of Ruth Markland, a British solicitor (Exh. 12).

The third affidavit was prepared by defendant Grant (Dkt. #93), to which two charts were attached (Exh. 1), indicating LEP's price on NASDAQ and on the London Stock Daily Exchange, from December 1988 to December 1991.

The last affidavit was prepared by Nicholas Wells ["Wells Aff't"] (Dkt. #94), to which the following two exhibits were attached: a copy of the "Project Bavaria" report, dated December 1989 (Exh. 1); and copy of LEP's Form 20-F, dated June 29, 1989 (Exh. 2).

[4]Three exhibits were attached: additional excerpts from the Hammond deposition (Exh. A); additional excerpts from the Crespel deposition (Exh. B); and an affidavit from defense counsel, Jeffrey E. Glen, with an Opinion by Nicholas Underhill, another English barrister (Exh. C).

filed a surreply brief (Dkt. #99).[5] On June 30, 1993, these motions were referred to this Magistrate Judge (Dkt. #95).

For the reasons stated below, defendants' motions are granted.

I.

FACTUAL BACKGROUND[6]

The jurisdictional facts are as follows:

As previously indicated, Itoba, a corporation organized under the laws of the States of Jersey, Channel Islands, is a wholly-owned subsidiary of ADT, a Bermudian corporation. ADT's primary business is providing electronic security services and alarm systems for residential and commercial property, and conducts an extensive security services business in the United States through its wholly-owned subsidiary, ADT Security Systems, a Delaware corporation (Hammond Aff't ¶¶3-4). ADT maintains executive offices in the United States, its stock is traded on the New York Stock Exchange, and approximately fifty percent (50%) of its shares are held in the United States (id. ¶6). Itoba is one of ADT's approximately twenty subsidiaries whose principal business is to hold investments for ADT (id. ¶¶7-9; Crespel Dep. Tr. at 59).

As previously indicated, LEP is a British corporation. "Ordinary Shares" of LEP's stock are traded on the London

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[5]Four additional exhibits were attached: additional excerpts from the East deposition (Exh. 1); additional excerpts from the Percival deposition (Exh. 2); additional excerpts from the Read deposition (Exh. 3); and an opinion letter from Samuel Stamler and Ian Glick, two more British barristers (Exh. 4).

The filings associated with these motions are nearly six inches thick.

[6]See note 8 infra.

Stock Exchange; however, since September 30, 1988, LEP's American Depository Shares ["ADS"] are traded on the National Association of Securities Dealers Automatic Quotation System ["NASDAQ"]; each ADS is evidenced by an American Depository Receipt ["ADR"], which represents five Ordinary Shares (Crespel Dep. Tr. at 100; Percival Dep. Tr. at 29, 61-62; Berkley Dep. Tr. at 54; Dkt. #87, Exh. 4, at 12-13; Dkt. #94, Exh. 2, at 14-16). It is in connection with the ADS's and ADR's that LEP has made its filings with the SEC (see, e.g., Dkt. #87, Exhs. 1-4; Dkt. #91, Exh. 3; Dkt. #94, Exh. 2). At issue in this litigation are LEP's filings, commencing in July 1989, of Form 6-K's and 29-F, which allegedly failed to disclose significant financial problems; various items were attached to such forms, including LEP's 1988 and 1989 Annual Reports, as well as a press release bearing the dateline, "Greenwich, Connecticut."

In spring 1990, ADT "recommended" to Itoba that the subsidiary purchase LEP stock (Hammond Aff't ¶14; Wells Aff't ¶¶12-14; Hammond Dep. Tr. at 59-60, 70-71, 106-07, 215; Crespel Dep. Tr. at 66-68, 85-86).[7] In reaching this "recommendation," ADT had relied upon a report prepared by an investment bank; this bank, in turn, had reviewed LEP's recent U.K. annual reports and circular to shareholders and its Form 20-F filed with the SEC (Wells Aff't ¶¶5-11, 14; Exh. 1). Executives at ADT, however, did not themselves review the SEC filings (Crespel Dep. Tr. at 74), nor did any executives at Itoba (id. at 68). Between June 4, 1990 and November 23, 1990, Itoba acquired 37,267,830 shares of LEP

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[7]ADT contends that it is common practice for a parent corporation to acquire securities through a wholly-owned subsidiary, which practice avoids early identification of the parent and minimizes disturbances in the market which might affect the stock's trading price (Hammond Aff't ¶13). However, ADT also conceded, at depositions, that the transaction would have been subject to U.K. taxation if the decision to purchase the stock had been made in England (Hammond Dep. Tr. at 215-16; Crespel Dep. Tr. at 25-26, 60, 66).

stock as they became available on the London stock market, for an aggregate price of approximately $114 million (Hammond Aff't ¶21). These shares were purchased through Shearson Lehman's London office, which in turn dealt with other stock brokerage firms, including two located in New York City (Hammond Aff't ¶¶9, 17-18; Hammond Dep. Tr. at 162-68, 218-20; Berkley Dep. Tr. at 54-68).

In September 1991, LEP first disclosed that it was facing financial problems; LEP ultimately wrote off $522 million in losses for that year (Hammond Aff't ¶20; Wells Aff't ¶16). As a result, the value of Itoba's shares fell to approximately $2.26 million, resulting in a loss of $111 million (Hammond Aff't ¶21).

II.

DISCUSSION

Defendants filed this motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, challenging this court's subject matter jurisdiction over this cause of action.[8]

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[8]A threshold matter to be resolved is the appropriate standard of review. There is no dispute that once a party challenges the district court's subject matter jurisdiction, the burden of establishing such jurisdiction rests on the party asserting jurisdiction. Wills v. Ferrandino, 830 F. Supp. 116, 122 (D. Conn. 1993); Washton v. U.S., 2:91 CV 121 (AHN), 1993 U.S. Dist. LEXIS 2863, at *6 n.1 (D. Conn. Feb. 12, 1993); Travelers Indemnity Co. v. Household International, Inc., 775 F. Supp. 518, 522 (D. Conn. 1991). Thus, plaintiff here bears the burden of establishing the court's jurisdiction.

There is similarly no dispute that in deciding a Rule 12(b)(1) motion challenging the district court's jurisdiction, the court may look beyond the complaint and rely on extrapleading materials. Hicks v. Brophy, 3:93 CV 1595(JAC), 1993 U.S. Dist. LEXIS 18495, at *5 (D. Conn. Dec. 14, 1993); Wills, supra, F. 830 Supp. at 122;

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A. SUBJECT MATTER JURISDICTION

Both the Securities Act of 1933 and the Securities and Exchange Act of 1934 are silent as to their extraterritorial application, so that the federal courts have had to determine "whether Congress would have wished the precious resources of the United States courts" to be used in resolving disputes between foreign entities in the area of securities fraud. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir.), cert. denied sub nom. Bersch v. Arthur Andersen & Co., 423 U.S. 1018 (1975). To determine whether the district courts have subject matter jurisdiction over these foreign transactions, the Second Circuit has fashioned two principal tests: the "effects test" and the "conduct test." Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir.), cert. denied, 112 S. Ct. 638 (1991). Only one of the two tests must be satisfied in order for subject matter

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Ensign-Bickford Co. v. ICI Explosives USA Inc., 817 F. Supp. 1018, 1023 (D. Conn. 1993); Washton, supra, 1993 U.S. Dist. LEXIS 2863, at *6 n.l. The parties disagree as to how a court should respond to conflicting affidavits, depositions, and documents. Under such circumstances, courts have looked to the decisions which have developed the standards for summary judgment under Rule 56 to "assist in resolving the problem encountered if the affidavits submitted on a 12(b)(1) motion should reveal the existence of factual problems." Exchange National Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); cf. Washton, supra, 1993 U.S. Dist. LEXIS, at *6 n.l.

Looking to Rule 56 summary judgment standards, the court will resolve all factual "ambiguities and inferences" in the light most favorable to the party opposing the motion, in this case, plaintiff Itoba. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Delaware & Hudson RY. Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990), cert. denied, 111 S. Ct. 2041 (1991). Thus, for the purposes of considering defendants' motions to dismiss, the facts will be viewed in the light most favorable to plaintiff. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1330 (2d Cir. 1972).

jurisdiction to be conferred on the district court in a securities fraud action. Psimenos v. E.F. Hutton & Co., Inc., 722 F.2d 1041, 1045 (2d Cir. 1983).

1. "CONDUCT TEST"

In Alfadda, supra, the Second Circuit's described the "conduct test" as follows: "a federal court has subject matter jurisdiction if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad." 935 F.2d at 478 (citations omitted).

This test has been applied with varying results. For example, in one of the earliest cases, Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1336-37 (2d Cir. 1972), the action was commenced by American citizens against (the now late) Robert Maxwell, a British citizen, with respect to a British company's stock, traded solely on the London Stock Exchange; subject matter jurisdiction was found because "substantial misrepresentations were made in the United States." The same conclusion more recently was reached in Alfadda, supra, 935 F.2d at 478-79, where the plaintiffs were all residents of Saudi Arabia or Bahrain, and the corporate defendants were either Netherlands Antilles or French companies. However, jurisdiction in this country was appropriate in that the allegedly fraudulent activity, i.e., negotiations and communications which diluted plaintiffs' shares, all took place in the United States. See also Psimenos, supra, 722 F.2d at 1045-48 (subject matter jurisdiction found in action brought by Greek citizen regarding purchases made through defendant's Athens and Paris offices, where plaintiff was induced by pamphlets prepared in the U.S. and where transactions were consummated in New York).

The plaintiff-class in Bersch, supra, were thousands of shareholders, who primarily were citizens of Canada, Australia, England, France, Germany, Switzerland and of

several other European, Asian, African, and South American countries, with some Americans. The action involved the stock of a Canadian company, which had its main business office in Switzerland; the underwriters included two large American banking houses -- Drexel Firestone, Inc. and Smith, Barney & Co -- and four foreign underwriting houses. The prospectuses, which were printed abroad in English, French, and German, and which were delivered to purchasers outside the United States, specifically provided that these shares of stock were not being offered in the U.S. In applying the "conduct test," the Second Circuit differentiated between three sets of plaintiffs: (1) American residents, who could commence securities actions here, without regard to whether the alleged acts of material importance occurred in this country; (2) American residents abroad, who were permitted to commence securities actions here "if, but only if, [alleged] acts . . . of material importance in the United States have significantly contributed [to their losses]"; and (3) foreigners, who could commence such actions here only if the "[alleged] acts . . . within the United States directly caused [their financial losses]." 519 F.2d at 993.

There is no doubt that the factual circumstances here present a closer picture than those presented in the above-referenced Second Circuit decisions. However, it would appear that plaintiff cannot prevail under the "conduct test" under the facts of this case. It is beyond dispute that SEC filings and press releases are the type of information on which an investor relies in making his or her investment decisions. Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968), cert. denied sub nom. Coates v. Securities & Exchange Comm'n, 394 U.S. 976 (1969). Even beyond the issue of whether the SEC filings were "merely preparatory to the fraud," plaintiff cannot demonstrate that the alleged acts within the United States "directly caused [its] losses" for two reasons. First, Itoba and ADT did not read the SEC filings or rely upon them; it was an investment bank hired by ADT which had reviewed these documents. And second, the SEC filings were filed in connection with LEP's ADS's and ADR'S, not the Ordinary Shares purchased by

Itoba, for which annual reports and press releases were generated from England.

This conclusion is consistent with two recent district court opinions, Koal Industries Corp. v. Asland, S.A., 808 F. Supp. 1143, 1153-55 (S.D.N.Y. 1992) and Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 107-08 (S.D.N.Y. 1993). In Koal Industries, the plaintiffs, a Panamanian corporation and nationals, acquired from companies organized in Netherlands Antilles an interest in a mining company located in Arkansas. The negotiations, the drafting of the purchase agreement, and its execution all took place in Switzerland; the financing was obtained from outside the United States. The only contact with the United States, other than the location of the mine, was a single telephone call seeking additional funding; the district court characterized that single telephone call as "at best, a preparatory act," so that subject matter jurisdiction was lacking. The underlying facts in Nathan Gordon Trust are even closer to this case. The defendant was a Canadian corporation whose stock was traded on the New York, Toronto, Montreal, and London Stock Exchanges; the alleged misrepresentations were authored entirely in Canada, although they were attached to documentation filed with the SEC here and to some extent circulated in this country. Relying upon Alfadda, supra, the district court limited the class action to transactions made on the New York Stock Exchange only:

> The court rules that the relevant "conduct" in the present case occurred in Canada where the alleged misleading information was authored. The mere filing of reports with the SEC and the dissemination of some materials to shareholders in the United States were merely incidental to the authorship, preparation and dissemination of the allegedly false information, all of which occurred in Canada. Accordingly, the court does not have

> subject matter jurisdiction over the claims arising from transactions on foreign exchanges.

148 F.R.D. at 108.

2. "EFFECTS TEST"

The second test to be applied is the "effects test," which applies "where illegal activity abroad causes a 'substantial effect' within the United States." Alfadda, supra, 935 F.2d at 478 (citation omitted). As the Second Circuit observed in Bersch, supra, this test is not met "simply because in the long run there was an adverse effect on this country's general economic interests or on American security prices," or when the alleged acts "simply have an adverse [e]ffect on the American economy or American investors generally." 519 F.2d at 989 (footnotes omitted).

Subject matter jurisdiction was found under the "effects test" in Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262-63 (2d Cir. 1989). The plaintiff there was a British corporation, with numerous American subsidiaries; half of its $2.4 billion in assets were located in this country. Defendant was a Luxembourg corporation, largely controlled by South African companies and individuals. The Second Circuit found that the "effects test" had been satisfied, because 2.5% of plaintiff's shareholders were American, holding approximately 5.3 million shares with a market value of approximately $120 million.

In contrast, no subject matter jurisdiction was found in Koal Industries, supra, where the plaintiff was not an American investor, the defendants' stock was neither registered nor listed on a national securities exchange, and the only financial damage was the demise of the Arkansas mine.

If the court were to focus solely upon Itoba, the only named plaintiff, it is clear that the "effects test" would not be satisfied. It is equally clear that if ADT were the plaintiff, the

"effects test" would be met, in that ADT's stock is traded on the New York Stock Exchange and approximately fifty percent (50%) of its shares are held in this country.

Itoba argues that ADT's attributes ought to be considered here, under the rationale of Leasco, supra. In that case, the named plaintiff was Leasco Data Processing Equipment Corporation ["Leasco"], an American corporation, which had negotiated to purchase more than five million shares in Maxwell's company, Pergamon Press Limited, a British company; such stock had been purchased with cash provided by its wholly-owned subsidiary, Leasco International N.V. ["Leasco N.V."], a Netherlands Antilles corporation, and Leasco had unconditionally guaranteed Leasco N.V.'s financial obligations. 468 F.2d at 1332-33. Leasco also sent a letter to the British company indicating that Leasco "has an interest" in the shares of stock, and that such shares "are held on behalf of Leasco . . . N.V." Id. at 1338. Among defendants' arguments to defeat subject matter jurisdiction was that the "purchaser" of the stock was not an American company but a Netherlands Antilles corporation. The Second Circuit disagreed:

> It seems quite arguable from all this that Leasco N.V. is holding the shares merely as trustee for Leasco, which has the beneficial interest and is bound to reimburse Leasco N.V. for the latter's expenditures. If that were so, defendants' contention that the true purchaser was a foreigner would be drained of force. But even if Leasco N.V. is the beneficial owner, it would be elevating form over substance to hold that this entails a conclusion that the purchases did not have a sufficient effect in the United States to make § 10(b) apply. Whether Leasco N.V. is merely a financial conduit, as plaintiffs assert, or was planned to conduct an active business, as some of the SEC filings indicate, it was wholly-owned and its debt securities were guaranteed by Leasco and were convertible

> with Leasco common stock. We see no need to enter into the debate whether, as defendants contend and plaintiffs deny, Leasco obtained substantial tax and other advantages through the incorporation of Leasco N.V. and the use of the latter to acquire the Pergamon shares.

Id. at 1338.

The Leasco case is distinguishable for at least three reasons. First, and most obvious, is the simple fact that the named plaintiff in Leasco was Leasco, an American corporation, and not its foreign subsidiary. Second, despite the copious filings made by both sides, no evidence was submitted here that ADT made any unconditional guaranties of Itoba's obligations. And third, the written contract between Leasco and Pergamon expressly provided that "at [Leasco's] election," the offer to purchase could be made "by a wholly-owned subsidiary of Leasco or a wholly-owned subsidiary of such subsidiary," and that Leasco "shall remain responsible for the due performance" of the obligation to acquire the shares. The Second Circuit thus concluded: "In acceding to this provision the defendants themselves recognized that Leasco, the United States company, remained at all times intimately involved in the transaction; the foreign entity was accepted by both sides as the alter ego of the American." Id. at 1338. In the present action, there were no similar negotiations between Itoba/ADT and LEP, so that LEP could be deemed to have viewed Itoba and ADT as being interchangeable.

In light of these distinguishing factors, this court is not willing to disregard corporate formalities and treat Itoba and ADT as functional equivalents.

B. FORUM NON CONVENIENS

Given the conclusion reached in Section II.A. supra, there is no need to address the issue of forum non conveniens.

III.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss (Dkt. ##83, 86, & 87) are granted.

See 28 U.S.C. § 636(b) **(written objections to ruling must be filed within ten days after service of same);** F. R. Civ. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d 15, 16 (2d Cir. 1989) **(failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).**

Dated at New Haven, Connecticut, this 4th day of February, 1994.

/s/
Joan Glazer Margolis
U.S. Magistrate Judge

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, provides:

> The district courts of the United States, and the United States courts of any Territory or other place, subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is any inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> * * *

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5, 17 CFR 240.10b-5, adopted pursuant to Section 10(b) of the Securities Exchange Act, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 3 of the Securities Act of 1934, 15 U.S.C. § 78c(a)(17) provides:

> (a) When used in this chapter, unless the context otherwise requires--
>
> * * *

(17) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) other interstate instrumentality.

Nos. 95-596, 95-606

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEP GROUP PLC, WILLIAM R. BERKLEY, and PETER J. GRANT,

Petitioners,

—v.—

ITOBA LIMITED,

Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MARK C. ZAUDERER
Counsel of Record
—and—
JAMES ROBERT PIGOTT, JR.
SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

RICHARD F. LAWLER
JAMES C. RILEY
WHITMAN BREED ABBOTT & MORGAN
100 Field Point Road
Greenwich, Connecticut 06830
(203) 869-3800

Attorneys for Respondent Itoba Limited

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STATEMENT PURSUANT TO RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Respondent Itoba Limited ("Itoba") is the wholly-owned subsidiary of A.D.T. Limited, a Bermudan corporation the shares of which are listed on the New York Stock Exchange. Itoba has no nonwholly owned subsidiaries.

JURISDICTION

Pursuant to Rule 24.2 of the Rules of this Court, respondent states that it is dissatisfied with the statement in the Petition filed by William A. Berkley and Peter J. Grant that "[t]he jurisdiction of the district court was invoked under 15 U.S.C. § 78c(17)." The Complaint alleges jurisdiction of the District Court under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the Court grant *certiorari* to review an interlocutory decision remanding the case to the District Court for further factual development of jurisdictional issues?

2. Should the Court grant *certiorari* when there is no conflict among the Circuits, which all apply a substantially similar Conduct Test/Effects Test analysis to determine subject matter jurisdiction over federal securities fraud claims?

3. Should the Court grant *certiorari* to review a decision that will not expand the territorial scope of the federal securities laws?

4. Should the Court grant *certiorari* to disturb twenty-five years of Circuit court decisions upholding the jurisdiction of the U.S. courts to regulate securities fraud in instances in

which fraudulent conduct either occurred in the United States or had substantial domestic effects?

STATEMENT OF THE CASE

A. Statement of Facts

The interlocutory order before the Court reinstated an action between two of the major competitors in the United States in the electronic security services business.[1] The action was commenced under the anti-fraud provisions of the federal securities laws to recover losses in excess of $100 million suffered by a single investor, A.D.T. Limited ("ADT"), arising from its investment, through its wholly-owned subsidiary, Itoba Limited ("Itoba"), in petitioner LEP Group plc ("LEP"). (A7)[2]

ADT, Itoba's parent, engages primarily in the businesses of providing security services (*i.e.*, residential and commercial property alarm systems) and conducting motor vehicle auctions in the United States and elsewhere. ADT's net sales in these two areas exceeded $1.2 billion for the year ended December 31, 1992. (JA438) ADT has thousands of shareholders, both record and beneficial owners, in the United States; as of May 1992, approximately 50 percent of ADT's common shares were held of record in the United States by

---

[1] The facts set forth were current as of the date of the perfection of respondent's appeal to the Second Circuit in July, 1994. The material facts giving rise to the claims have not changed. We note that, within the past two months, petitioner LEP Group plc's security service subsidiary in the United States, National Guardian Corporation, has been sold.

[2] All references herein to "A__" are to pages of the Appendix to the Petition for a Writ of Certiorari filed by petitioners William R. Berkley and Peter J. Grant (hereinafter the "Berkley Pet."). All references herein to the "LEP Pet." refer to the Petition for Writ of Certiorari with Attached Appendix filed by petitioner LEP Group plc. All references to "JA___" are to pages of the Joint Appendix filed on the appeal before the Second Circuit.

over 2,000 record holders. (JA439) ADT's stock trades on the New York Stock Exchange. (JA439)

ADT has executive offices, which supervise its substantial North American operations, in Boca Raton, Florida, where its Chairman and its Chief Financial Officer maintain offices. (JA439) ADT conducts its extensive security services business in the United States through its wholly-owned subsidiary, ADT Securities Systems, a Delaware corporation. ADT is the largest single provider of central station monitoring security services in the United States, employing approximately 7,000 employees throughout the country. (JA438) Through its subsidiaries, ADT owns 55 offices in the United States. (JA462)

ADT's other principal business, conducting auctions for the sale and purchase of motor vehicles, employs approximately 3,100 persons in the United States on a full-time basis. (JA438) Thus, in total, ADT, through its wholly-owned subsidiaries, employs over 10,000 persons in the United States. (JA438, JA461)

LEP is a competitor of ADT in the United States, and, like ADT, is engaged extensively in the security and alarm services business, as well as the freight forwarding business. (JA741) LEP's security service business in the U.S. is conducted through its wholly-owned subsidiary the National Guardian Corporation ("National Guardian"), which is headquartered in Greenwich, Connecticut. National Guardian employs approximately 2,000 persons throughout the United States (JA690) and in 1989 had revenues of $200 million from its operations in the United States. (JA691)

LEP's securities trade in this country on the NASDAQ in the form of American Depository Shares ("ADS's"), representing American Depository Receipts ("ADR's") issued by an American depository in exchange for LEP's ordinary shares on deposit (each LEP ADR represents the bundling of five ordinary shares of LEP). (A7) As the Second Circuit

observed, there was a "direct linkage" between the trading price for LEP ordinary shares and LEP ADR's: "If the ordinary share price fell on the London Exchange, the market price of an ADR would decrease in similar manner, and vice versa." (A12) As a result of having registered its shares on the NASDAQ, LEP has subjected itself under Section 12(b)(1) of the Securities Exchange Act of 1934 [15 U.S.C. § 78l(b)(1)] to regular reporting requirements of the Securities and Exchange Commission (the "SEC").

LEP's investments in United States businesses include its substantial investment in real estate limited partnerships developing property in California and Nevada (JA692-96), and a trade finance company, Trading Alliance Corp. ("T.A.C."), headquartered in New York City. (JA697-99)

ADT's Interest in Investing in LEP and Its Analysis of the Company

ADT had acquired a relatively small amount of LEP securities as a result of the 1988 merger between LEP and National Guardian, in which ADT already held stock. ADT began to analyze potential further investments in LEP, with a view toward possibly acquiring National Guardian through an acquisition of LEP itself. (JA440-41)

In December, 1989, Michael Ashcroft, the Chairman of ADT, requested that Nicholas Wells, an ADT executive, undertake an evaluation of LEP in conjunction with Canadian Pacific, another company contemplating an investment in LEP. Wells had been hired by ADT to assist in managing its program of securities investments, and, as a result of his prior investment banking experience, was well-acquainted with techniques of valuation and investment analysis. (JA524-26)

Canadian Pacific had commissioned two companies to analyze and report on the business of LEP: S.G. Warburg, an investment bank, and LEK, a management consulting group. In December 1989 and January 1990, Nicholas Wells of ADT

met with representatives of Canadian Pacific, S.G. Warburg and LEK in order to discuss the reports produced by them, which had been provided to ADT. (JA526)

In performing his analysis of LEP, Wells, who was in charge of ADT's investigation of LEP, obtained and made extensive use of a report produced by S.G. Warburg (the "Report"). The Report was based heavily on LEP's filings with the SEC. As explicitly stated in the introduction to the Report:

> The analysis set out herein is based on publicly available information on [LEP], including recent U.K. annual reports and circular to shareholders, *the U.S. annual report on Form 20-F for the year ended 31st December, 1988 (the "Form 20-F")*, the company's shareholder register and brokers' reports. (JA534; emphasis added).

The Report given to Wells relied heavily on LEP's U.S. filings with the SEC, because as noted in the Report:

> In trying to analyze [LEP's] financial performance, the Form 20-F provides a more detailed description of the company's business activities than the U.K. accounts. (JA539)

The Report was not all that Wells studied. The disclosure documents themselves filed by LEP with the SEC in the United States were central to ADT's analysis of LEP. Wells was provided by Canadian Pacific with a copy of the LEP Form 20-F for the year ended 1988, which had been filed by LEP with the SEC on June 30, 1989. (JA594-670) As Mr. Wells stated in his affidavit before the District Court, "I regarded the LEP 1988 Form 20-F as highly significant for my analysis of LEP, as it was the most recent Form 20-F that had been filed by LEP." (JA527)

In March 1990, Canadian Pacific abandoned the idea of acquiring LEP jointly with ADT. ADT, however, remained

interested in exploring a strategic investment in LEP, and Mr. Wells continued his analysis of LEP. (JA527-28)

ADT's Decision to Purchase LEP Stock

David Hammond, Deputy Chairman of ADT, and Michael Ashcroft, the Chairman of ADT, conferred with ADT's Nicholas Wells regularly throughout the early part of 1990 regarding the progress of Mr. Wells' analysis of LEP and the conclusions he was formulating. (JA441-42, JA528)

In the Spring of 1990, Mr. Hammond discussed ADT's possible investment in LEP with Michael Ashcroft, the Chairman of ADT. Their discussion resulted in a decision that ADT would undertake a program of acquiring LEP stock. This decision was based largely on the analysis Mr. Wells had conducted of LEP, relying on LEP's U.S. filings with the SEC, such as its Form 20-F for 1988, and the Report commissioned by Canadian Pacific, which was also based on LEP's SEC filings. The contemplated stock acquisition program involved making purchases of LEP stock in the open market or through negotiated transactions as LEP stock became available, in such a way as to minimize the effect on the trading price of LEP stock. (JA442-43, JA672-73)

ADT decided to implement its purchase program through Itoba, one of its wholly-owned subsidiaries created to hold the investments of ADT. Itoba is a Channel Islands corporation formed by ADT to acquire and hold securities investments for ADT with funds provided by ADT. (*See* JA511-22.)[3]

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[3] Itoba's principal business, as disclosed in Schedules 13D filed by ADT with the SEC, is "to hold investments for A.D.T." (JA514) The significant investments by Itoba and ADT's other subsidiaries are identified in ADT's Annual Report and in its filings with the SEC as investments held *by ADT*, as opposed to the particular ADT subsidiary used to hold ADT's investment. For example, in ADT's Form 20-F for the year ended December 31, 1991, Itoba's investment in LEP is identified as an investment of ADT. (JA453)

In order to implement ADT's decision to invest in LEP, David Hammond contacted a member of the Itoba Board (which is elected by its sole shareholder, ADT), advised him of ADT's decision and recommended that Itoba acquire LEP stock on behalf of the ADT Group. Itoba adopted its parent corporation's recommendation ("[a]s expected," as the Second Circuit observed (A8)).

Itoba then implemented the ADT stock purchase program by contacting, in turn, William Grant, an ADT employee, and requesting that Mr. Grant commence making the purchases of LEP stock on behalf of Itoba. (JA686-87, JA444, JA672-73) Mr. Grant made the first purchase of LEP stock on June 4, 1990.

After the purchase program commenced, Mr. Wells continued his analysis of LEP. On or about June 29, 1990, LEP filed its Form 20-F for the year ended December 31, 1989. Mr. Wells obtained a copy of the 1989 Form 20-F in early July 1990, and he analyzed the disclosure contained in that Form 20-F to compare its information with that contained in the Form 20-F for the prior year (*i.e.*, 1988). Based upon this comparison, Mr. Wells concluded that there was no reason for ADT to abandon its ongoing program of acquiring LEP shares through Itoba (JA529), and the purchases continued.

ADT's Purchase of 7,300,000 LEP Shares Held by Defendant William Berkley

On October 8, 1990, ADT, through Itoba, purchased 7,300,000 LEP shares from petitioner William R. Berkley ("Berkley"), an American citizen and resident of Greenwich, Connecticut. David Hammond, ADT's Deputy Chairman, personally conducted the negotiation for this substantial purchase with Lehman Brothers Securities ("Lehman"), brokers he believed to be acting on behalf of Berkley. (JA445) As noted above, Berkley was a director of LEP and the president of its Connecticut subsidiary, National Guardian.

The Berkley transaction was set in motion when Berkley contacted his broker in Manhattan (New York & Foreign Securities Corporation) to arrange for the sale, which was cleared through Bear Stearns & Co. in New York. (JA705-06, JA59) Berkley's brokers, acting through Lehman's London branch, then contacted Mr. Hammond to inform ADT that 7,300,000 shares were being offered for sale by a United States-based holder of LEP stock. Through information from Lehman that the shareholder was based in the United States and was not selling his entire holdings of LEP stock, Mr. Hammond correctly concluded that the 7,300,000 shares that were being offered for sale were held by Berkley. (JA445) After negotiations with the broker over the price to be paid, Itoba purchased Berkley's 7,300,000 shares. Berkley, after paying his broker's commission, received $23,888,300 from the sale. (JA707-08, JA59)

With the purchase of the 7,300,000 shares from Berkley and several small purchases of LEP stock shortly thereafter, ADT suspended its purchase program in November 1990. ADT continued to analyze LEP for the purpose of considering whether to make a tender offer for LEP or otherwise to attempt to acquire National Guardian. (JA445)

Beginning in September, 1991 and continuing into 1992, LEP made a series of public disclosures that rocked the company and brought its stock value tumbling down. LEP disclosed for the first time that it had been making substantial, high risk investments and had engaged in previously undisclosed activities that were not central to its business. LEP wrote off $522 million in losses on its 1991 financial statements, a staggering result. (JA446, JA529-30) The most substantial part of the write-offs related to the previously undisclosed and unauthorized operation of a knitwear company conducted through LEP's New York-based trade finance subsidiary, T.A.C., and write-offs of its investment through the issuance of letters of credit in connection with real estate in California and Nevada.

LEP's current management has blamed former management for events that caused ADT's losses and has questioned the adequacy of prior public disclosures. At a meeting of LEP shareholders on August 24, 1992, David James, the new LEP Chairman, stated that it was "possible that the Board under my direction may wish to initiate legal actions regarding various matters which have led to a loss of shareholders' value in their Company" and (JA772-73) that "[s]hareholders may well feel it appropriate to enquire how such a series of calamities may have befallen their company in a relatively short period of time." (JA779) In response to a shareholder question at the meeting regarding non-disclosure in LEP's financial statements, Mr. James conceded that "the question of whether on occasions full and proper disclosure has been made is one which requires some subsequent and further review." (JA783)

The value of ADT's $114 million investment in LEP had plummeted to $2.26 million as of the commencement of this action in September, 1992, representing a loss of approximately $111 million. (A9) This loss was borne by ADT's numerous U.S. shareholders (A15), as ADT has written off on its own balance sheet the entire amount of its $114 million investment in LEP. (JA903)

In the wake of these disclosures, ADT decided to commence this action. The Complaint, filed on September 22, 1992 in the name of its subsidiary Itoba, asserts claims against all defendants pursuant to Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], to recover damages arising from defendants' fraudulent non-disclosure in filings made by LEP with the SEC. (JA38, JA42-44) In addition to the claims asserted against LEP and against its directors as Section 20(a) "controlling persons" under Section 10(b) and Rule 10b-5, Itoba asserts independent claims for federal securities violations against petitioner Berkley arising out of his personal sale of LEP securities for over $23 million. (A9)

B. The Proceedings Below

Itoba commenced this action on September 22, 1992 in the United States District Court for the District of Connecticut. On February 4, 1994, a Magistrate Judge rendered a Recommended Ruling, recommending that the District Judge grant petitioners' motions to dismiss for lack of subject matter jurisdiction. (A22-35) On March 14, 1994, the District Judge, in a one-sentence Endorsement Order, over Itoba's objection adopted the Recommended Ruling of the Magistrate Judge. (A21)

On May 15, 1995, the Second Circuit, in a unanimous decision, reversed the District Court's order of dismissal, remanding the action to the District Court for further proceedings. Petitioners filed a petition for rehearing with a suggestion for rehearing *en banc*, which was denied by the Second Circuit on July 14, 1995. (A1-2) LEP Group plc, William R. Berkley and Peter J. Grant filed petitions for writ of *certiorari* on or about October 12, 1995; defendants John L. Read and John R. East have not sought *certiorari*. On October 12, 1995 and November 3, 1995, petitioners filed motions with the District Court to dismiss the action on the grounds of *forum non conveniens*. Those motions are pending.

REASONS FOR DENYING THE WRIT

I.

IN VIEW OF THE SECOND CIRCUIT'S REMAND FOR FURTHER DEVELOPMENT OF JURISDICTIONAL FACTS, THE SUPREME COURT SHOULD NOT REVIEW THIS INTERLOCUTORY DECISION

The decision that petitioners urge this Court to review is interlocutory. In reversing the District Court's dismissal for lack of subject matter jurisdiction, the Second Circuit remanded for "a trial on the merits in which the facts relevant to jurisdiction may be more fully developed." (A18)

The Second Circuit also took particular note of the Magistrate Judge's erroneous factual findings on which the District Court had based its decision, including the erroneous finding that neither ADT nor Itoba had read and relied on LEP's SEC filings in making their purchase decision. (A11) Among the additional facts related to jurisdiction that the Second Circuit left for development on remand is whether the sale by Berkley of 7,300,000 shares of LEP stock through a New York broker and the purchase of such shares by Itoba on the same day was "coincidental."[4] (A16)

Thus, the Court is confronted with an interlocutory order based on a disputed and, in some respects, undeveloped factual record. The well-settled jurisprudence of this Court points clearly to the denial of *certiorari* to review such an order. *See Virginia Military Institute v. United States*, U.S. ___, 113 S.Ct. 2431, 2432 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our *certiorari* jurisdiction"). Issuance of a writ of *certiorari* in cases presented for review of interlocutory orders is confined to instances in which review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

There is yet another procedural reason why the Court should decline to review the Second Circuit's interlocutory order—one which illustrates the wisdom of declining review of interlocutory orders. On October 12 and November 3, 1995, petitioners moved in the District Court for dismissal of this action on the ground of *forum non conveniens*. While

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[4] Itoba contended below that Berkley's sale and Itoba's purchase constituted effectively a direct sale from Berkley to Itoba; Berkley contended that he sold his shares on the market, to no purchaser in particular.

Itoba is opposing the motions, the District Court's determination could dispose of this action prior to the opportunity for review by this Court. Adherence in this case to the Court's general rule declining the review of interlocutory orders would prevent potentially unnecessary review by this Court. Petitioners, of course, will have the opportunity to seek a full review of any jurisdictional issues should the *forum non conveniens* motions be denied and a judgment in Itoba's favor be rendered at trial.

II.

PETITIONERS HAVE SKEWED THE RECORD TO OBSCURE SUBSTANTIAL CONDUCT AND EFFECTS WITHIN THE UNITED STATES

Not surprisingly, petitioners seek to characterize this action as entirely "foreign." (*See* Berkley Pet. at 4 ("foreign purchases of foreign securities on foreign exchanges . . ."); LEP Pet. at 2 (same).) However, the Second Circuit appropriately cut through petitioners' attempts to obscure the substantial conduct by defendants, and effects of defendants' actions, within the United States, which satisfy the well-settled "Conduct Test" and "Effects Test" for subject matter jurisdiction. The significantly domestic nature of the conduct and effects is apparent from the following facts recognized by the Second Circuit:

1. The alleged fraud culminated with LEP's filing with the SEC in Washington, D.C. of documents containing material misrepresentations and omissions. (A13) Thus, this is not the kind of case appropriately screened by the Conduct Test, in which defendants have engaged in a fraud abroad and, along the way, have engaged in some "merely preparatory" activity within the U.S. borders before the fraud is consummated abroad.

2. As discussed within, because LEP has elected to take advantage of U.S. markets by trading its securities on the NASDAQ (A7), LEP is required to make regular disclosures in filings with the SEC under Section 12(b)(1) of the Securities Exchange Act of 1934 [15 U.S.C. § 78l(b)(1)].

3. ADT sought out and relied on LEP's SEC filings in making its decision to invest over $100 million in LEP. (A11)

4. Consistent with its precedents focusing on the economic substance of a transaction for the determination of jurisdiction (*see Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972)), the Second Circuit observed that the investment in LEP securities at issue was made, and the loss incurred, by Itoba's parent company, ADT, a company whose shares are listed on the New York Stock Exchange and roughly 50 percent of whose shareholders of record reside in the United States. (A7)

5. Perhaps the most glaring of petitioners' omissions is the absence of any discussion concerning the claim against petitioner William R. Berkley, a United States citizen working and residing in Greenwich, Connecticut, who was a director of LEP and the President of its U.S. subsidiary, National Guardian. His personal sale originating in Greenwich, Connecticut of over $23 million in LEP securities, which were purchased by Itoba, forms the basis of a sizeable portion of Itoba's claim for damages on its federal securities fraud claims. (A9, A16-17)

Such substantial conduct and effects within the United States, completely ignored by petitioners, satisfy the requirements for subject matter jurisdiction under the well-settled "Conduct Test" and "Effects Tests," as discussed in Point III.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS

In an attempt to create the appearance of a substantial conflict among the Circuits, petitioners, at great length, describe past applications of the "Conduct Test" and the "Effects Test" by different Circuits. (Berkley Pet. at 8-17.) However, more than anything else, petitioners' argument demonstrates not a conflict among the Circuits, but only differences in emphasis in their application of these tests.

All of the Circuits, without exception, apply a Conduct Test/Effects Test analysis for the determination of subject matter jurisdiction—an analysis originating in the Second Circuit's decision in *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969), and applied by the Second Circuit in this case. And in most cases, the result of the analysis by the different Circuits to a given set of facts would yield the same conclusion: either finding jurisdiction or finding it lacking.

Although various Circuit courts have developed somewhat different formulations of the Conduct Test/Effects Test, no "conflict" exists among the Circuits within the meaning applied by this Court. As a commentator of this Court's *certiorari* jurisprudence has observed, a conflict for the purposes of a *certiorari* petition "means that there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern *et al.*, *Supreme Court Practice*, § 4.3 at 167 (1993).[5]

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[5] *See, e.g., United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (interpretation of federal statute by the Sixth Circuit and the Third Circuit was "squarely inconsistent"); *Ins. Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 700 (1982) (Third Circuit's decision that a discovery sanction imposing finding of personal jurisdiction did not violate due process "directly conflict[ed]" Fifth Circuit decision); *see also Commissioner v. Scottish Amer. Inv. Co.*, 323 U.S. 119, 121 (1944) ("The irreconcilable conflict between the two courts below led us to grant certiorari.")

On repeated occasions, *certiorari* has been sought to review Circuit court decisions finding subject matter jurisdiction over federal securities fraud claims involving foreign aspects. In each case, this Court has denied *certiorari*.[6] And in *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba) Ltd. v. Securities and Exchange Comm'n*, 431 U.S. 938 (1977), the petitioners sought *certiorari*, arguing, just as petitioners have in this case, that *certiorari* should be granted to resolve an alleged conflict between the Third, Second, Eighth and Ninth Circuits as to the proper standard for subject matter jurisdiction over federal securities fraud claims involving foreign elements. Yet, this Court denied *certiorari*. *Kasser*, *supra*, 431 U.S. 938 (1978).

Much of petitioners' argument relating to conflict is based on their claim that the Second Circuit, in *Itoba*, departed from its own restrictive Conduct Tests/Effects Test formulation, thereby expanding the continuum between those Circuits adhering to the most restrictive formulation and those adopting the most expansive. This suggestion is simply not so.

As petitioners concede, the Second Circuit jurisdictional test has always been among the most restrictive. In this case, the Second Circuit's discussion of the jurisdictional issue is mostly a pointed analysis of how the District Court misread critical facts before it on the jurisdictional motion. In discussing these facts in relation to the Conduct Test and Effects Test, the Court did not create a new formulation; it simply applied its tests to the facts before it.

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[6] *See Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969). *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. Securities and Exchange Comm.*, 431 U.S. 938 (1977); *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984) (claims under the anti-fraud provisions of the Commodities Exchange Act).

In discussing the Conduct Test, the Court set forth its traditional formulation, citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975) and *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991). (A10) The Court then rejected the District Court's finding that LEP's United States-based activities did not "directly cause" Itoba's financial losses. (A11) Again applying its familiar test, the Second Circuit also found that the filing of fraudulent SEC filings in Washington, D.C. constitutes fraudulent activity in this country that is not "merely preparatory" to a fraud committed outside the United States. (A13-15) Nowhere did the Second Circuit say, or suggest, that it was changing its test or that Itoba failed to meet its traditional Conduct Test.

Similarly, in applying the Effects Test, the Second Circuit broke no new ground. Rather, the Court emphasized that the District Court erred in finding the Effects Test not met merely because Itoba, and not ADT, was the plaintiff. (A15-A16)

Much of petitioners' argument focuses on the Second Circuit's observation that, with respect to the Conduct Test and the Effects Test, "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." (A10) To suggest that this observation represents either a fundamental shift in Second Circuit jurisprudence, or a major change in subject matter jurisdiction jurisprudence when taken in context of other Circuit court decisions—all of which differ slightly in their formulation of the Conduct Test/Effects Test analysis—is to grossly exaggerate the implication of that observation.[7]

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[7] Even assuming *arguendo* that *Itoba* created a new formulation of the Conduct Test/Effects Test analysis, it is by no means clear that the formulation would expand jurisdiction. Just as elements which would not independently satisfy the Conduct Test or Effects Test might, in combination, produce a finding of jurisdiction, where a showing of *either* conduct or effects is particularly weak, a court might decline jurisdiction under *Itoba*.

Petitioners' conflict argument merely shows that in a particular case, subject matter jurisdiction theoretically could exist under the formulation of one Circuit and not the other. However, because of the substantial overlap of the Conduct Test/Effects Test analysis as applied in every Circuit, the nuances among the Circuits' formulations do not create a conflict that justifies granting *certiorari*.

Finally, whatever the differences among the Circuits, this case would serve as a poor vehicle for this Court to speak on the issue of subject matter jurisdiction. This is not a "close" case, in which one particular Circuit court's formulation would support jurisdiction while another's would preclude it. Because this case would pass muster under the most restrictive formulation (that applied by the Second Circuit and D.C. Circuit), there is no question that jurisdiction would be found in Circuits which, as petitioners recognize, have a more expansive view of jurisdiction.[8]

IV.

THE SECOND CIRCUIT'S DECISION WILL NOT OPEN THE FLOODGATES TO FEDERAL SECURITIES ACTIONS LACKING SUBSTANTIAL CONDUCT OR EFFECTS WITHIN THE UNITED STATES

Petitioners contend that:

> The Second Circuit decision threatens to open the doors of the United States courts to foreign purchasers of foreign securities on foreign exchanges that the United States has little interest in regulating.

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[8] Petitioners misleadingly suggest that the Second Circuit's reference to "questionable law" is a criticism of its own subject matter jurisdiction jurisprudence. (Berkley Pet. at 16.) As apparent from the context of the reference, the Second Circuit was merely referring to the Magistrate Judge's misapplication of Second Circuit precedent.

Berkley Pet. at 4. Indeed, petitioner LEP goes so far as to say:

> [T]he Court of Appeals has created a new doctrine under which any foreign corporation must anticipate that any purchaser of its securities, anywhere in the world, who received advice from anyone, American or not, which was derived in any manner and at any level of indirectness from information that appeared in an SEC filing, can sue in an American court, provided some shareholder of the purchaser (or as in this case a shareholder of the purchaser's corporate parent) is American.

(LEP Pet. at 10-11.)

Petitioners' dire prediction that this decision will produce a flood of Rule 10b-5 actions is sheer speculation, unsupported by any empirical evidence, and, of course, any history. Should this prediction prove true, there is time enough for this Court to revisit the issue, and to evaluate both the number of those filings and the quality of those actions when measured against the purposes underlying the U.S. securities laws. However, the reality is that the facts supporting jurisdiction in this case could not be alleged by the myriad, hypothetical plaintiffs who petitioners claim will flood this country's courts in the wake of the *Itoba* decision. Petitioners' arguments completely overlook the substantial conduct and effects within the United States in this case, which few putative Rule 10b-5 plaintiffs will be able to allege, let alone prove.

In their briefs below, petitioners made many of the same doomsday arguments they have made here. The Second Circuit correctly contrasted ADT's circumstances from those of the many plaintiffs that petitioners speculate will overwhelm our courts: "Unlike some securities actions brought to recover questionable damages on behalf of optimistically described classes, *we are met here with a single plaintiff which suffered direct substantial losses*." (A17; emphasis added) Similarly, the Second Circuit correctly distinguished

this case from a fraud on the market case in which a plaintiff would not allege actual reliance on SEC filings. (A14) Only the plaintiff who can allege facts showing actual reliance will find support in the holding in *Itoba* as a basis for subject matter jurisdiction.

Petitioners also suggest that a defendant's fraudulent filings with the SEC are an insufficient or unpredictable basis for subject matter jurisdiction. (See Berkley Pet. at 25 ("Any investor claiming that a foreign market was somehow influenced by an ADR filing would now be entitled to a United States forum.")) Petitioner LEP asserts that now "nearly every foreign transaction of securities involving a company with some connection to the United States will subject all parties to the transaction to the prospect of litigation in the United States." (LEP Pet. at 22.)

However, LEP is hardly "a company with some connection to the United States." LEP, through its wholly-owned U.S. subsidiary National Guardian, was one of the major providers of electronic security services in the United States. Moreover, LEP had taken the significant step of registering its securities on the NASDAQ, which the SEC treats for reporting purposes as a "national exchange." As petitioner LEP itself points out, the Securities Exchange Act of 1934 (the "Exchange Act"), in its statement of legislative purpose, expresses Congress' concern with the "national market system," citing 15 U.S.C. § 78b. (LEP Pet. at 12.) As a result of availing itself of the benefits of trading on the NASDAQ, LEP was required to register its ADR's with the SEC pursuant to Section 12(b)(1) of the Exchange Act [15 U.S.C. § 78(l)(b)(1)].[9]

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[9] By registering its securities on the NASDAQ, LEP lost the benefit of an exemption for registration enjoyed by many foreign corporations whose securities trade in this country as ADR's *but do not trade on a national exchange*. Section 12(g) of the Exchange Act [15 U.S.C. § 78l(g)]and the regulations thereunder provide a lower tier "information-supplying" exemption for companies whose securities do not trade on a national exchange. This exemption establishes a system of supplying

There is nothing inappropriate, unbounded or unpredictable about subjecting to the anti-fraud provisions of the federal securities laws a company that has elected to register its securities on a U.S. national market system like the NASDAQ. Companies with "merely some connection to the United States," for whom LEP purports to express concern, need not fear being haled into the U.S. courts in the wake of the *Itoba* decision.

Petitioners also suggest that the holding in this case would allow jurisdiction so long as "some shareholder of the purchaser (or as in this case, of the purchaser's corporate parent) is American." (LEP Pet. at 11.) Jurisdiction was not found merely because "some shareholder . . . [was] American." The Second Circuit found that [h]ere, we have fraud occurring on an American exchange that has impacted detrimentally *upon thousands of United States shareholders* in the defrauded company, *i.e.*, over $100 million lost in the shareholders' corporate equity." (emphasis supplied) (A15) Allowing jurisdiction on these facts will not open the floodgates to litigation.

If anything, the Second Circuit's analysis in *Itoba* ensures that subject matter jurisdiction will not be found in cases lacking significant conduct in, or effects within, the United States. By considering an "admixture or combination" of the

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information that is less rigorous than the periodic reporting requirements of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] to which LEP is subject. When a foreign issuer has its ADR's listed for trading on NASDAQ, as LEP has done, it becomes subject to the more rigorous reporting requirements under Section 13(a) of the Exchange Act. The "information-supplying" exemption was made unavailable to foreign issuers whose securities trade on NASDAQ because:

> [T]he [SEC] believes that foreign securities included in NASDAQ should be regarded prospectively as voluntarily seeking U.S. trading markets and hence should be denied the information supplying exemption.

Securities Act Release No. 6493, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶83,435 at 86,295 (Oct. 6, 1983).

Conduct Test and the Effects Test (A10), the Court can decline jurisdiction if there is a troubling gap in the level of either U.S. conduct or U.S. effects.

V.

THIS COURT SHOULD NOT GRANT *CERTIORARI* BASED ON LEP'S SUGGESTION THAT THERE SHOULD BE NO EXTRATERRITORIAL APPLICATION OF THE FEDERAL SECURITIES LAWS

Not content with suggesting a conflict among the Circuits, LEP asserts that the federal securities laws should never be given extraterritorial effect. (LEP Pet. at 11-12.) This argument would overturn not only the decision in this case, but would reverse the law of all the Circuits, which, without exception, determine the existence of subject matter jurisdiction under the Conduct Test/Effects Test analysis.

The characterization of the jurisdictional issue as the "extraterritorial" application of the U.S. securities laws is somewhat of a misnomer to the extent it implies that a federal court would exercise jurisdiction over a purely foreign dispute. Traditionally, the term has been applied to disputes in which *some*—not all—of the relevant conduct or transactions has occurred abroad; were the conduct or transactions at issue to be entirely "extraterritorial," the issue of purported U.S. jurisdiction would never arise. Therefore, in any given case, the issue is not whether the court should exercise jurisdiction over a purely foreign dispute, but whether the conduct or effects within the United States are sufficient to justify the assertion of jurisdiction.

LEP bases its argument against any extraterritorial application of the federal securities fraud laws on its assertion that "[t]he language of the Exchange Act does not directly disclose any intention to give it extraterritorial affect [sic]" (LEP Pet at 11.) In *Tamari v. Bache & Co. (Lebanon) S.A.L.*, the

petitioners for *certiorari* made the same argument LEP makes in this case, and this Court denied *certiorari*. See *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 469 U.S. 871 (1984) (*certiorari* petition argued that the Seventh Circuit had erred by applying the Conduct Test and Effects Test).

Through the development of the Conduct Test/Effects Test analysis, the Circuit courts, led by the Second Circuit, have applied the federal securities laws to provide a remedy for fraudulent conduct in this country injuring foreigners (so long as that conduct is not "merely preparatory" to the fraud), and fraudulent conduct causing a "substantial effect" within the United States. *See generally, Alfadda, supra,* 935 F.2d at 478. The Second Circuit, followed by every Circuit Court considering the question, has applied a Conduct Test/Effects Test analysis so that American courts would not be powerless to prevent "the United States [from] be[ing] used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *IIT v. Vencap.*, 519 F.2d 1001, 1017 (2d Cir. 1975). Petitioners point to no substantial source of dissatisfaction from the Congress, the courts or any of the foreign governments for whom petitioners express concern. Twenty-five years of this settled and workable jurisprudence should not be lightly cast aside.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of *Certiorari* filed by LEP Group plc, William R. Berkley and Peter J. Grant should be denied.

Respectfully submitted,

MARK C. ZAUDERER
Counsel of Record

—and—

JAMES ROBERT PIGOTT, JR.
SOLOMON, ZAUDERER,
ELLENHORN, FRISCHER
& SHARP
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

RICHARD F. LAWLER
JAMES C. RILEY
WHITMAN BREED ABBOTT
& MORGAN
100 Field Point Road
Greenwich, Connecticut 06830
(203) 869-3800

Attorneys for Respondent
Itoba Limited